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IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1994

WMX TECHNOLOGIES, INC.
WMI WASTE MANAGEMENT OF CANADA, INC.
WASTE MANAGEMENT OF MICHIGAN, INC.
Petitioners,

v.

CANADIAN GENERAL INSURANCE COMPANY, COMMERCIAL UNION ASSURANCE COMPANY OF CANADA, ROYAL INSURANCE COMPANY OF CANADA, WELLINGTON INSURANCE COMPANY, AND AUTO OWNERS INSURANCE COMPANY,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE NEW JERSEY SUPREME COURT

PETITION FOR A WRIT OF CERTIORARI

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120 pp

QUESTION PRESENTED

Whether a state court has the power, consistent with the Due Process Clause of the Fourteenth Amendment of the United States Constitution, to exercise personal jurisdiction over insurers who expressly agree in their general liability policies to defend and cover claims in the forum state, irrespective of any other contacts with the forum state, when (1) the action seeks to declare and enforce the insurers' promise; (2) the forum state has a strong interest in the action; and (3) the insurers will not be unduly burdened if required to defend the action in the forum state.

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CANADIAN GENERAL INSURANCE COMPANY, COMMERCIAL UNION ASSURANCE COMPANY OF CANADA, ROYAL INSURANCE COMPANY OF CANADA, WELLINGTON INSURANCE COMPANY, AND AUTO OWNERS INSURANCE COMPANY,
Respondents.

On October 13, 1994, the Supreme Court of New Jersey entered a decree dismissing Respondents[1/] from this comprehensive, multi-party environmental insurance coverage action on grounds that New Jersey does not have the constitutional power to exercise personal jurisdiction over them. Petitioners WMX Technologies, Inc. (formerly known as Waste Management, Inc.), WMI Waste

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1/ The five Respondents are Canadian General Insurance Company, Commercial Union Assurance Company of Canada, Royal Insurance Company of Canada and Wellington Insurance Company (collectively, the "Canadian Respondents"), and Auto Owners Insurance Company ("Auto Owners").

Management of Canada, Inc., and Waste Management of Michigan, Inc. (collectively referred to herein as "Waste Management")[2/] respectfully petition for a writ of certiorari to review the October 13 decree of the New Jersey Supreme Court.

OPINIONS BELOW

The opinion of the Superior Court of New Jersey, Law Division (App. at 1A-40A), Hudson County, and the opinion of the New Jersey Supreme Court (App. at 41A - 81A) are currently unreported.

JURISDICTION

The New Jersey Supreme Court entered its decree on October 13, 1994. Jurisdiction of this Court is invoked pursuant to 28 U.S.C. Section 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

New Jersey permits its courts to exercise jurisdiction over non-residents "to the utter-most limits permitted by the United States Constitution." Charles Gendler & Co. v. Telecom Equipment Corp., 102 N.J. 460, 469, 508 A.2d

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2/ Pursuant to Rule 29.1, the following is a list of all parent companies or subsidiaries of Petitioners, excluding wholly owned subsidiaries: Chemical Waste Management, Inc., General Nuclear Systems, Inc., Masurca C.A., M.S.T.S., Inc., National Seal Company, Refuse Removal Systems, Inc., Rust International, Inc., Waste Management International PLC, Wheelabrator Technologies, Inc., and WMI Medical Services of Indiana, Inc.

1127, 1131 (1986). This petition thus raises a pure question of constitutional law under the Due Process Clause of the Fourteenth Amendment: ". . . nor shall any State deprive any person of life, liberty, or property, without due process of law. . . ." No issues of state law are implicated in this case.

STATEMENT OF THE CASE

I. The Proceedings Before the Trial Court

Waste Management and its subsidiaries are in the business of transporting and disposing of solid and hazardous waste. They face claims from the United States Environmental Protection Agency, state environmental authorities and others alleging that Waste Management or its predecessor companies are liable to pay the costs of cleanup of environmental damage at waste sites located in New Jersey and across the United States and Canada. Waste Management presented these claims to its liability insurers, which had issued primary, excess or umbrella liability policies promising to defend and indemnify Waste Management against such liabilities throughout the United States and Canada. The insurers, however, refused to provide coverage under their policies.

Petitioners and related subsidiaries filed this declaratory judgment action in New Jersey in January 1992, to secure the coverage to which they are entitled under their liability policies. The case is large and complex, including claims by 56 plaintiffs against 150 insurance companies which, at different times over thirty years, issued 648

primary, umbrella or excess liability policies relating to ninety-seven sites in the United States and Canada, of which seventeen are in New Jersey. App. at 2A. The claims are also closely intertwined in that most of the insurers and their policies are involved at multiple sites. Because of the overlapping claims, issues and parties, litigation of the claims in a single comprehensive proceeding is most efficient and economical; severance of this case into pieces is impracticable. See App. at 16A-18A, 26A, 29A-31A.[3/]

In April 1992, Respondents moved to dismiss, claiming that they lacked sufficient contacts with New Jersey to warrant the court's exercise of personal jurisdiction over them. By order dated September 17, 1992, the trial court denied Respondents' motions to dismiss. It did so on two grounds.

First, the trial court found that Respondents promised in their policies to provide insurance services (i.e., to defend, investigate and cover claims) anywhere in the United States, including in New Jersey. Royal Insurance Company of Canada, for instance, promised to provide coverage:

> anywhere in the world with respect to damages because of bodily injury or property damage provided that suit for such damages against the Insured is brought within Canada or the Continental United States of America.

3/ This petition does not involve all of the parties to the action below. Pursuant to Supreme Court Rule 14.1(b), the names of the parties in the action below are listed at pages 41A-51A of the Appendix.

Likewise, Auto Owners promised to execute its obligations under its policies anywhere "within the United States of America, its territories or possessions, Canada or Mexico. . ." The policies issued by the other Respondents contain similar "territory of coverage" provisions also promising to perform their contractual duties anywhere in the United States, including New Jersey.

Based on these promises by Respondents, the trial court ruled as follows:

> An agreement to cover claims anywhere in the United States or in any state in the United States or an agreement to cover claims where property damage occurs anywhere in the United States imports an obligation to go to and to appear in any state in the United States. It is de minimis an implied consent to the "jurisdiction" of those states. If an insurer agrees to go anywhere in the United States to defend a claim there, it is surely foreseeable that the insurer may, in fact, be called upon to enter a formal appearance there. It is a waiver of the right of the insurer to assert the contention that there is a lack of in personam jurisdiction. It is itself a nexus with those states. It creates an expectation in the insured that the insurer is not beyond the reach of any of those states. It is reasonable to find jurisdiction on that basis.

App. at 10A-11A. The trial court further reasoned that the reasonable expectations of the Respondents were not frustrated by importing an obligation to appear in any state court in the United States based upon their promises to defend and cover claims anywhere in the United States, since such claims are highly mobile:

> Claimants can pursue the insured in any state where the insured can be found or where its assets or property can be found. Claimants are not limited to assert claims in only such jurisdictions as the insurer may elect in which to have its insured sued.

App. at 11A.

As an independent basis supporting the exercise of the court's power over Respondents, the trial court adopted the jurisdictional analysis set forth by Judge Weinstein in Ashley v. Abbott Laboratories, 789 F. Supp. 552 (E.D.N.Y. 1992). App. at 15A. Under Judge Weinstein's analysis, a court in a complex, multi-party suit may exercise personal jurisdiction over a defendant if the forum state has an appreciable interest in the action and the defendant is not unduly burdened by mounting a defense in the forum state. Ashley, 789 F. Supp. at 587.

Applying the Ashley approach to this complex action, the trial court found that New Jersey had a strong interest in the action, noting especially that more sites in the action were related to New Jersey than to any other state, and that 75% of the defendants faced claims at sites related to New Jersey. App. at 17A, 22A-23A. The trial court also emphasized New Jersey's strong interest in a comprehensive adjudication of claims sharing common issues of law and fact

as reflected in New Jersey's "entire controversy" doctrine. Finding that the same policies, parties and issues overlapped at the many environmental sites involved in this case,[4] the court concluded that it would be impractical and inefficient to break the action into pieces for duplicative adjudications in multiple jurisdictions involving the same issues, parties and policies. See App. at 17A-18A, 29A-31A.

The court further recognized the state's interest in protecting the vast majority of the parties brought into New Jersey under "classic in personam rules from the burdens and ill consequences which they must bear if the litigation is fragmented by the inability to join some of the defendants." App. at 17A.[5] Moreover, the trial court, relying upon the case of Westinghouse v. Liberty Mutual Insurance Co., 233 N.J. Super. 463, 559 A.2d 435 (N.J. App. Div. 1989), recognized New Jersey's strong judicial policy of not fragmenting large insurance coverage actions like this one:

> This kind of fractionalization is a most potent weapon in the arsenal of the litigant whose

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[4] For instance, at the Canadian site at which the claims involving the Canadian Respondents arise, Waste Management also seeks coverage from 46 other insurers that issued 125 different policies. Those other defendants are also involved at numerous other sites in the action.

[5] With respect to the parties to this action, the trial court stated:

> New Jersey also has a 'sovereign interest' in the defendant carriers. One hundred and fifteen of the carrier, that is 75% of the defendants, are involved in New Jersey 'related' sites . . .

App. at 17A.

> primary and subversive aim is to impose both upon the judicial system and the adversary by endlessly delaying the day upon which the entire controversy will finally come to an end and the respective rights of the litigants resolved -- clearly, consistently, and finally. It is only the single comprehensive action, designed to adjudicate the entire controversy between litigants, which can protect both the court and the parties from that calculated imposition.

Westinghouse v. Liberty Mutual Insurance Co., 233 N.J. Super at 470-71, 559 A.2d at 439.

Turning to the issue of undue burden — the second prong of Judge Weinstein's Ashley analysis — the trial court explicitly found that the Respondents were not unduly burdened in defending this action in New Jersey. See App. at 12A-13A and 20A.

> The defendants have not demonstrated that this forum is demonstrably inappropriate either to process the issues in the litigation or to try the case fairly. They have not made a clear showing of real hardship.

App. at 20A.

II. The Decision of the New Jersey Supreme Court

Following the trial court's September 17, 1992 order, Respondents filed motions for leave to appeal. The New Jersey Appellate Division denied the Respondents' motions. The Supreme Court of New Jersey thereafter granted leave

to appeal and, following briefing and oral argument, reversed the trial court's personal jurisdiction ruling.

Specifically, the New Jersey Supreme Court held that, in the absence of additional "forum-related events," a promise by an insurer to defend and cover claims in New Jersey does not create sufficient contacts to constitutionally empower the trial court to exercise personal jurisdiction over the insurer for the purpose of construing and enforcing the insurer's policy obligations. App. at 64A. The New Jersey Supreme Court also rejected the trial court's use of Judge Weinstein's analysis in Ashley, holding that New Jersey's "interest nexus" in resolving massive environmental insurance coverage cases without fragmentation cannot serve as a basis for the assertion of personal jurisdiction over the Respondents. App. at 66A.

It is important to note, however, that the New Jersey Supreme Court did not accept Respondents' arguments of undue hardship if forced to litigate in New Jersey, which the Supreme Court termed as "flimsy at best." App. at 69A.

REASONS FOR GRANTING THE PETITION

This case is worthy of review by this Court for multiple reasons.

- There is a conflict between certain federal circuit courts of appeal and the highest courts of certain states, including New Jersey, as to whether an express promise by an insurer to provide insurance services within the forum state provides a constitutionally sufficient basis to permit the forum state's court to exercise jurisdictional power over the insurer. It is important to resolve this conflict,

especially in light of the increasing number of large, comprehensive insurance coverage cases throughout the country;

- There is a conflict in principle between the decision of the New Jersey Supreme Court and Judge Weinstein's jurisdictional analysis in Ashley, which correctly recognized the inadequacy of the "minimum contacts" jurisdictional analysis in modern litigation, especially large, complex cases with parties located nationwide;

- There is confusion in the case law concerning the relevance of a "territorial nexus" with a state in determining the state's power to exercise jurisdiction over a party. No such requirement is found in the text of the Due Process Clause of the Fourteenth Amendment. This case will allow the Court to reexamine the justification for such a requirement for defendants.

I. The Promise to Perform Insurance Services in New Jersey

A. The Decision Of The New Jersey Supreme Court Rejecting The "Territory Of Coverage" Rule Conflicts With Decisions Of The First, Fourth, Sixth And Ninth Circuits, And Comports With Decisions Of The Supreme Courts Of Arizona and Florida, and the Appeals Court of Wisconsin.

Insurers include in virtually all liability policies a provision defining the geographical scope of coverage

afforded to the policyholder by the particular policy. The "territory of coverage" rule provides that any state within the contractually agreed upon territory of coverage may exercise personal jurisdiction over the insurer, subject to dismissal on grounds of forum non conveniens. W. Hoffman, Personal Jurisdiction Over Alien Insurance Companies: The Territory-of-Coverage Rule, 26 Tort & Insurance Law Journal 703 (1991). Application of the rule has been summarized as follows:

> In exercising jurisdiction, the courts infer the necessary contact from policy language defining the territory of coverage. In short, if the geographical scope of the coverage includes the forum state, then the court, having jurisdiction over the insured, may exercise jurisdiction over the insurer as well. In theory, this "territory-of-coverage" rule bases jurisdiction exclusively on a contractual provision. In a case against an alien liability insurer, it may support jurisdiction over a defendant who engaged in no forum-related conduct.

W. Hoffman, supra, at 703.

There is a split of authority among courts regarding the validity of the "territory of coverage" rule. The rule has been accepted by the majority of federal courts addressing the issue. Rossman v. State Farm Mutual Automobile Insurance Co., 832 F.2d 282 (4th Cir. 1987) (broad language of territory of coverage provision was not "fortuitous or accidental"; rather, insurer had chosen to provide geographically broad coverage in order to obtain the higher premiums that such a contract garners. Thus, the

expectation of being haled into court in a foreign state within the territory of coverage is an express feature of the policies); Puerto Rico v. The SS Zoe Colocotroni, 628 F.2d 652 (1st Cir. 1980) cert. denied, 450 U.S. 912 (1987) (District Court for District of Puerto Rico had jurisdiction over British insurer that included Puerto Rico within its territory of coverage. The insurer had the ability through the terms of the insurance contract to control the forums in which it could be haled into court); Farmers Insurance Exchange v. Portage La Prairie Mutual Insurance Co., 907 F.2d 911 (9th Cir. 1990) (District Court for the District of Montana could exercise jurisdiction over Canadian insurer whose only contact with the forum was its territory of coverage provision where such provision included Montana, because "litigation requiring the presence of the insurer [in Montana] is not only foreseeable, but it was purposefully contracted for by the insurer"); Payne v. Motorists Mutual Insurance Co., 4 F.3d 452 (6th Cir. 1993) (by choosing to provide coverage in all fifty states, the Ohio insurer purposefully availed itself of every individual state's forum).[9]

In sharp contrast, the Supreme Court of Arizona in Batton v. Tennessee Farmers Mutual Insurance Co., 153 Ariz. 268, 736 P.2d 2 (1987), the Supreme Court of Florida in Meyer v. Auto Club Insurance Ass'n, 492 So.2d 1314 (Fla. 1986), the Appeals Court of Wisconsin in Marsh v. Farm Bureau Mutual Insurance Co., 179 Wis.2d 42, 505 N.W.2d 162 (1993), rev. denied, 510 N.W.2d 137 (Wis., Nov. 15, 1993), and now the New Jersey Supreme Court in this case, have rejected the exercise of personal jurisdiction on the basis of territory of coverage clauses. These courts

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[9] See also American & Foreign Ins. Ass'n. v. Commercial Ins. Co., 575 F.2d 980 (1st Cir. 1978); W. Hoffman, supra, at 709 n.45.

held that the inclusion of the forum state within the territory of coverage does not establish with the forum state. For instance, in Meyer, the insured argued that the risk of loss occurring in Florida was a foreseeable consequence of the insurer's issuance of an automobile liability policy "with the covered territory defined as the fifty states." 492 So.2d at 1316. The Florida Supreme Court, citing World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 100 S.Ct. 559 (1990), rejected that such foreseeability did not constitute a basis for establishing in personam jurisdiction. Meyer, 492 So.2d at 1315. Similarly, the Arizona Supreme Court in Batton v. Tennessee Farmer's Mutual Insurance Co., 153 Ariz. 268, 272, 736 P.2d 2, 6 (1987), reasoned:

> Issuing an insurance policy providing nationwide coverage is no different than selling a product, such as a car, with a warranty that it is fit for its intended use and with the knowledge that it may be used nationwide. World-Wide Volkswagen establishes that jurisdiction is improper in either case.

As the foregoing cases demonstrate, there is a split between federal circuit courts and state supreme courts requiring resolution by this Court. According to one commentator, "[u]ntil the Supreme Court affirmatively endorses or rejects the territory-of-coverage rule in an international case, the question of whether such clauses alone establish 'minimum contacts' will, no doubt, continue to arise." W. Hoffman, The Territory of Coverage Rule, supra, at 716.

Resolution of the conflict is important because the jurisdictional effect of the territory of coverage rule has far-

reaching consequences for both insurance companies and their policyholders. Territory of coverage clauses are included in virtually all liability insurance policies to define the geographical scope of the insurers' promises to supply insurance services. Furthermore, disputes between policyholders and insurers inevitably arise over the scope of coverage; an insurer should not be allowed to take advantage of the conflicting decisional law to delay resolution of coverage disputes by arguing, under the pretext of due process, that the insured's chosen forum is inappropriate. The ground rules concerning where an insured may bring suit against an insurer should be firmly established. See Bowen v. Massachusetts, 487 U.S. 879, 930, 108 S.Ct. 2722, 2750 (1988) ("Nothing is more wasteful than litigation about where to litigate.") (Scalia J., dissenting). Insurance coverage disputes concerning the source of funds for cleanup of waste sites should be adjudicated as promptly and efficiently as possible, not tied up in procedural knots over the forum choice.

B. The Promise To Perform Insurance Services In New Jersey, In And Of Itself, Supplies Sufficient Minimum Contacts For The New Jersey State Court's Exercise of In Personam Jurisdiction Over the Respondents.

Respondents' promises to perform insurance services in New Jersey constitute, in and of themselves, "minimum contacts" with New Jersey to empower the New Jersey state court to exercise in personam jurisdiction in an action to declare, construe and enforce Respondents' promises.

By committing to perform anywhere within the contractually specified territory of coverage, each

Respondent insurer agrees to appear anywhere within that coverage area to investigate, defend and settle claims or pay judgments, and knows that it can be called upon to honor that agreement. Indeed, the expectation of being haled into a New Jersey state court is an express feature of Respondents' policies.

Rossman v. State Farm Mutual Automobile Insurance Co., 832 F.2d 282 (4th Cir. 1987), illustrates the correct jurisdictional analysis. In Rossman, the applicable policy's "territory of coverage" clause included "[t]he United States of America, its territories or possessions." Id. at 285. The court noted that this broad language was not "fortuitous or accidental;" to the contrary, the insurer had chosen to provide geographically broad coverage in order to obtain the commercial advantages that such a contract brings. Id. at 287. An insurer cannot reasonably complain about a court exercising jurisdiction in the face of such language because the "expectation of being haled into court in a foreign state is an express feature of [their] polic[ies]." Id. at 286-87.

> Presumably, [the insurer] offers this type of broad coverage to induce customers to buy its policies and to pay higher premiums for them . . . . This type of clause, assuring policyholders that they will be covered under a broad range of circumstances in a broad range of forums, is basic to the product that [the insurer] markets. If [the insurer] wished to avoid suit in Virginia or any other forum, it could have excluded that state from the "policy territory" defined in the policy.

Id. at 287. (emphasis added).

In short, when an insurer agrees to discharge its policy obligations in every state of the United States, as the Respondents have, it must be deemed to have sufficient contacts to be haled into the courts of every state. If Respondents, which drafted their insurance contracts, did not want to be subject to suit in New Jersey, they simply could have excluded New Jersey from their "territory of coverage." Instead, they made a deliberate business decision to insure risks nationwide and to collect the premiums that their insureds would pay for that broad coverage. They cannot now escape the consequences of that contractual commitment by simply denying that they expected to be sued in New Jersey.

It is also important to remember that the policies at issue here are liability policies. The risks insured against are lawsuits brought against the insureds by third parties; the costs covered by the insurance include the costs of defending the suits and the costs of settling or paying judgments rendered in the suits. These risks are extremely transitory. Given the expansive views of jurisdiction and venue now prevalent, there is no way to predict--much less control--where claimants may sue the insured.[7/]

Just as the insured cannot predict where it may be sued, the insurer cannot predict where it will be called upon to perform its policy obligations. Unlike the insured,

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7/ Certain insurance industry amici acknowledged this when they stated in their amicus brief to the New Jersey Supreme Court "[s]ince many insureds cannot predict where they might be exposed to liability outside of the states or regions where they are located or where their activities are conducted," insurers offer policies with "typically very broad" territory of coverage clauses to allay policyholders' concerns about the geographical scope of their coverage.

however, the insurer has complete control over where it promises to respond to claims. Each Respondent has defined the territorial scope of its policy responsibilities in a territory of coverage provision. By committing to perform anywhere within the contractually specified territory, the insurer knows that it can be called upon to appear anywhere within that territory to investigate, defend, and settle claims, and to pay judgments. If the insurer can be called upon to appear on behalf of an insured and defend it in any court in the territory, it is certainly reasonable to expect the insurer to appear in one of those same courts to resolve disputes related to the scope of its policy duties.

The New Jersey Supreme Court placed great emphasis on the fact that the damages for which Petitioners seek coverage from Respondents arose at sites outside of New Jersey (i.e., there was no "forum-related event"). App. at 64A. There was, however, a "forum-related event" -- Respondents' agreement to perform services in the state. That connection with the forum state exists whether Waste Management's damages were incurred in New Jersey or elsewhere. Indeed, the location of the environmental sites giving rise to the claims for coverage is of no constitutional relevance because the "unilateral activity of another party or a third person is not an appropriate consideration when determining whether a defendant has sufficient contacts with a forum State to justify an assertion of jurisdiction." Helicopteros Nacionales de Colombia v. Hall, 466 U.S. 408, 417, 104 S.Ct. 1868, 1873 (1983) (emphasis added), citing Kulko v. California Superior Court, 436 U.S. 84, 93, 98 S.Ct. 1690, 1697 (1978) and Hanson v. Denckla, 357 U.S. 235, 253, 78 S.Ct. 1228, 1239 (1958).

C. The Promise to Perform Insurance Services in New Jersey Constitutes Constructive Consent To In Personam Jurisdiction In New Jersey.

The New Jersey Supreme Court decision ignores the fact that personal jurisdiction is waivable and that a litigant may give express or implied consent to personal jurisdiction in a variety of ways. Burger King Corp. v. Rudzewicz, 471 U.S. 462, 472 n.4, 105 S.Ct. 2174, 2182 n.4 (1985). By promising to defend and cover claims in New Jersey, Respondents constructively consented to in personam jurisdiction in actions by their policyholder to enforce their policy obligations. By the same token, they waived any right to object to the exercise of jurisdiction by courts within the territory of coverage.

As an integral part of their agreements to provide a variety of insurance services to Waste Management throughout the United States, including New Jersey, Respondents agreed to appear in any court in the country to provide a defense for the policyholder.[1/] A reasonable corollary to this is to appear in the same courts to resolve disputes over the scope of coverage under the liability policies. Stated otherwise, by agreeing to perform their contractual duties within New Jersey, the Respondents constructively consented to suit in New Jersey regarding the scope of their duties under the liability policies. See Victoria Transport, Inc. v. Comisaria General, 336 F.2d 354, 363 (2d Cir. 1964) (agreement to arbitrate in New York

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[1/] Indeed, at least some of the Respondents admitted in response to discovery requests that they retained counsel in New Jersey for the purpose of fulfilling their contractual obligations to their insureds.

constitutes constructive consent to jurisdiction of New York courts to enforce arbitration agreement).

The New Jersey Supreme Court did not address whether a "territory of coverage" clause amounted to constructive consent; rather, the court applied only a "minimum contacts" analysis. A minimum contacts analysis is not relevant, however, where a party has consented, either expressly or constructively, to the jurisdiction of the court. Insurance Corp. of Ireland, Ltd., et al. v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 704, 102 S.Ct. 2099, 2105 (1982).

II. Due Process and "Territorial Nexus"

A. The New Jersey Supreme Court Decision Conflicts in Principle with Judge Weinstein's Decision in Ashley Regarding The Appropriate Due Process Analysis In Complex, Multi-Party Litigation.

A conflict in principle exists between the New Jersey Supreme Court decision and the decision in Ashley. This conflict cuts at the very core of personal jurisdiction jurisprudence, and joins the issue of whether there is any constitutional requirement within the Due Process Clause that the exercise of in personam jurisdiction be conditioned upon a "territorial nexus" between the defendant and the forum state. The Court should grant certiorari to resolve this fundamental conflict.

In Ashley,[9/] Judge Weinstein reasoned that in complex multi-party litigation, "the irrationality of the territorial nexus requirement is arguably most evident and the need for an improved approach most urgent." 789 F.Supp. at 586. "At the center of the problem is the idea that the Due Process Clause forbids a state legislature from empowering the state's courts to adjudicate cases against defendants having no territorial nexus with the state." Id. at 577.

In place of the "territorial nexus" requirement, Judge Weinstein applied an "interest nexus" inquiry, which requires the following:

> [F]irst determine if the forum state has an appreciable interest in the litigation, i.e., whether the litigation raises issues whose resolution would be affected by, or have a probable impact on the vindication of, policies expressed in the substantive, procedural or remedial laws of the forum. If there is an appreciable state interest, the assertion of jurisdiction is prima facie constitutional.

Id. at 587.

9/ The Ashley case involved a group of plaintiffs claiming damages resulting from exposure to diethylstilbestrol ("DES") manufactured by a group of drug company defendants located across the country. One of the defendants, a California corporation, moved to dismiss for lack of personal jurisdiction, contending that it had no contacts with New York. The defendant argued that it had never shipped or sold its product in New York, that it had never been licensed to do business in New York and that it never advertised in New York.

Upon establishing a prima facie forum state interest, "the assertion of jurisdiction will be considered constitutional unless, given the actual circumstances of the case, the defendant is unable to mount a defense in the forum state without suffering relatively substantial hardship." Id.

In this case, the trial court adopted the two-prong analysis set forth in Ashley, finding a sufficient state interest in the litigation as a whole, and no undue burden on Respondents.[10/] The New Jersey Supreme Court, however, rejected this analysis. For the reasons which follow, this conflict in principle requires resolution, especially in the context of large, multi-party cases.

Other than in Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 105 S.Ct. 2965 (1985), this Court has never addressed the proper due process analysis to be applied in complex litigation "involving parties from across the nation." Ashley at 574.[11/] Rather, the "jurisprudence of jurisdictional due process has been developed in cases almost all of which involved one or a few parties on each side." Ashley, 789 F. Supp. at 585. Modern litigation, however, increasingly involves multiple parties, including national and international defendants, complex issues compelling adjudication in one forum and due process considerations for both plaintiffs and defendants. Such massive complex

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10/ The New Jersey Supreme Court ruled that Respondents' burden argument made in connection with their forum non conveniens were "flimsy at best."

11/ In Shutts, involving hundreds of plaintiffs across the country, the Court held that "minimal due process protection" — notice and an opportunity to be heard — was sufficient for the state court to exercies jurisdiction over the plaintiffs.

lawsuits may arise in the context of mass disasters (such as air crashes) mass exposure to toxic substances or defective products (e.g., asbestos, DES, lead paint, Agent Orange), and mass insurance coverage cases. In these actions, "[v]ery complex questions as to jurisdiction, choice of law, liability, causation and damage apportionment typically result." Ashley, 789 F. Supp. at 562. Such cases call for comprehensive adjudication in a single proceeding:

> [L]itigation in multiple fora ultimately produces unfair and inefficient results: similarly situated plaintiffs obtain disparate remedies, state and federal courts across the country are clogged and costs become exceptionally high.

Id.

The "minimum contacts" standard was originally designed to protect the defendant against litigating in an inconvenient forum. See Phillips Petroleum Co. v. Shutts, 472 U.S. at 808, 105 S.Ct. at 2972. With the advancements in transportation and communications technology, sophisticated case management technologies, and the practical advantages gained in mass litigation involving multiple parties, however, the cry of undue burden now rings hollow. According to the court in Ashley:

> Mass torts suits typically are brought against groups of corporate defendants. In these cases the intuition linking territorial inconvenience concerns -- that a defendant in a civil case must travel to the forum to defend him-, her- or itself -- is factually least plausible. As a rule, local counsel rather than

> defendants appear for motion and trial practice. Discovery need not and often will not take place in the forum.
>
> * * *
>
> The actual litigation costs per case of defendants in mass cases is also likely to be lower than the costs to defendants appearing alone. To the extent permitted by professional ethical rules, defendants often can cooperate to defray costs by effecting a division of labor. Even where defendants do not explicitly cooperate, in many mass cases some defendants will rely on the work of the defendants with the greatest potential exposure in the case and therefore the greatest interests in litigating effectively.

789 F.Supp. at 586.

The facts and circumstances of this case present the Court with the perfect opportunity to resolve the conflict regarding the proper due process standard in complex, multi-party actions:

(1) there are 56 plaintiffs in this case residing throughout the United States and in Canada;

(2) there are approximately 150 corporate defendant insurers located across the United States, in Europe and in Canada;

(3) the vast majority of the defendants have assented to jurisdiction of the New Jersey Court;

(4) the liability insurance policies, environmental sites and issues of policy interpretation are so interwoven that no single claim can be broken

> off and heard separately without resulting in a wasteful duplication of effort and insignificant prejudice arising from inconsistent adjudications (i.e., two different courts might interpret the same policy language differently).

This case, in sum, gives this Court an opportunity to consider the due process rights of the plaintiffs and of the defendants -- both those defendants objecting to personal jurisdiction and those who are not.

III. Certiorari Should Be Granted To Permit This Court To Resolve The Confusion Within Supreme Court Jurisprudence As To The Current Role Of The Due Process Clause In Limiting The Power Of A State Court To Exercise Personal Jurisdiction.

The Due Process Clause of the Fourteenth Amendment protects a person's liberty interest: "no state shall . . . deprive any person of life, liberty, or property, without due process of law. . .." U.S. Const. amend. XIV, Section 1. As reasoned by the Court:

> Many controversies have raged about the cryptic and abstract words of the Due Process Clause but there can be no doubt that at a minimum they require that deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case.

Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 313, 70 S.Ct. 652, 656-57 (1950).[12/]

Since ratification of the Fourteenth Amendment, the Court has developed various rationales for imposing limits on the power of a state court to exercise in personam jurisdiction over out of state residents. This Court first imposed a constitutional limitation on the power of a state court to exercise in personam jurisdiction based upon the Due Process Clause in Pennoyer v. Neff, 95 U.S. 714 (1878). This limitation on a state court's power was derived from the Court's reliance in Pennoyer on two principles of state sovereignty: "[E]very State possesses exclusive jurisdiction and sovereignty over persons and property within its territory [and] no State can exercise direct jurisdiction and authority over persons or property without its territory." Pennoyer, 95 U.S. at 722; see also L. McDougal, Judicial Jurisdiction: From a Contacts to an Interest Analysis, 35 Vanderbilt Law Review 1 (1982). Thus, the "territorial nexus" requirement originally was founded in principles of sovereignty.[13/]

Justice Hunt vigorously dissented in Pennoyer, rejecting the premise that the Due Process Clause provides any constitutional limitation on assertions of state court

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12/ See also Phillips Petroleum Co. v. Shutts, 417 U.S. 797, 105 S.Ct. 2964 (1985); McGee v. Int'l Life Insurance Co., 355 U.S. 220 (1957) ("[t]here is no contention that the respondent did not have adequate notice of the suit or sufficient time to prepare its defenses and appear").

13/ See P. Borchers, From Pennoyer to Burnham and Back Again, supra, at 92 ("The most on-again, off-again theme in personal jurisdiction is the notion that constitutional intervention in personal jurisdiction is necessary to preserve interests of 'federalism' or 'sovereignty.'")

jurisdiction beyond the requirement of notice and an opportunity to be heard. Id. at 733. Indeed, the limitation of a state court's power is found nowhere in the body of the Constitution, much less in the terms of the Due Process Clause. See M. Reddish, Due Process Federalism and Personal Jurisdiction: A Theoretical Evaluation, 75 N.W. Law Review, 1112, 1114 (1981). ("The terms of the Fourteenth Amendment's Due Process Clause referred to the rights of 'persons,' not states. Certainly, nothing in the clause's language would lead one to believe that inter-state sovereignty concerns would play any role in its interpretation.")

Although this Court's decision in International Shoe v. Washington, 326 U.S. 310, 66 S.Ct. 154 (1945), ushered in an era of expanded jurisdictional reach for state courts, the "minimum contacts" test as developed in International Shoe retained the territorial view of jurisdiction based on sovereignty first enunciated in Pennoyer. Indeed, in World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 291-292, 100 S.Ct. 559, 564 (1986), the Court recognized that the "minimum contacts" protected sovereignty interests:

> [A] state court may exercise personal jurisdiction over a non-resident defendant only so long as there exist 'minimum contacts' between the defendant and the forum State. The concept of minimum contacts, in turn, can be seen to perform two related but distinguishable, functions. It protects the defendant against the burdens of litigating in a distant or inconvenient forum. And it acts to ensure that the states, through their courts, do not reach out beyond the limits imposed on

> them by their status as coequal sovereigns in a federal system.

Id. (citation omitted). However, in Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 102 S.Ct. 2099 (1982), the Court fully retreated from the notion that sovereignty or federalism concerns are embedded in the Due Process Clause and instead interposed as a rationale for limiting a state court's power to exercise in personam jurisdiction, the preservation of individual liberty interest:

> The restriction on state sovereign power described in World-Wide Volkswagen Corp., however, must be seen as ultimately a function of the individual liberty interest preserved by the Due Process Clause. That Clause is the only source of the personal jurisdiction requirement and the Clause itself makes no mention of federalism concerns. Furthermore, if the federalism concept operated as an independent restriction on the sovereign power of the court, it would not be possible to waive the personal jurisdiction requirement: Individual actions cannot change the powers of sovereignty, although the individual can subject himself to powers from which he may otherwise be protected.

Id. at 702, n.10, 102 S.Ct. at 2104 n.10. See also Burger King Corp. v. Rudzwicz, 471 U.S. 462, 471-72, n.13, 105 S.Ct. 2174, 2181-82, n.13 (1985) ("the Due Process Clause protects an individual's liberty interest . . . although this protection operates to restrict state power, it 'must be seen as ultimately a function of the individual liberty interest

preserved by the Due Process Clause' rather than as a function 'of federalism concerns.'") quoting in part Insurance Corp. of Ireland, 456 U.S. at 702-703, n.10, 102 S.Ct. at 2104-2105, n.10.

In the most recent personal jurisdiction case, the Court seemed to come full circle and return to Pennoyer's enclave conception of jurisdiction: "to determine whether the assertion of personal jurisdiction is consistent with due process, we have long relied on the principles traditionally followed by American courts in marking out the territorial limits of each State's authority." Burnham v. Superior Court, 495 U.S. 604, 110 S.Ct. 2105, 2110 (1990); see also P. Stephens, Sovereignty and Personal Jurisdiction Doctrine: Up the Stream of Commerce Without A Paddle, 19 Florida State University Law Review 105, 106, 130 (1991) (noting that in Burnham the Court relied not upon fairness or reasonableness concerns of the petitioner but instead on sovereign power as traditionally defined: power over one physically present.)

The Court should grant certiorari to re-examine the alleged constitutional underpinnings of the territorial nexus requirement that has found its way into personal jurisdiction jurisprudence. The territorial nexus requirement does not address the core concerns of due process -- notice and a full and fair opportunity to be heard and increasingly has become an obstacle to comprehensive adjudication of issues that should be heard comprehensively in a single forum.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

1. Trial Court Opinion 1A

2. New Jersey Supreme Court Opinion 41A

NOT FOR PUBLICATION WITHOUT THE APPROVAL

OF THE COMMITTEE ON OPINIONS

WASTE MANAGEMENT, INC., ET AL PLAINTIFFS V. THE ADMIRAL INSURANCE CO., ET AL DEFENDANTS	SUPERIOR COURT OF NEW JERSEY LAW DIVISION: DOCKET #: HUD-L-931-92 CIVIL ACTION OPINION

DECIDED: AUGUST 21, 1992

Please see attached list.

MARGULIES, J.S.C.

This declaratory judgment action is a tangled cluster of claims by fifty-six plaintiffs against 150 insurance companies which, at different times over thirty years, have issued 648 primary, underlying or umbrella environmental liability policies relating to ninety-seven sites in the United States of which seventeen are in New Jersey.

Plaintiffs are a conglomerate or family of entities of Waste Management, Inc. All but one are present subsidiaries. They are predecessors of or merged into or were engulfed or acquired by or became affiliated with Waste Management, Inc. over the years. Plaintiffs are engaged in the disposal of solid and hazardous waste products for their customers. They collect, treat, transfer and dispose of waste. They have been and are subject to environmental damage claims by customers, governmental agencies and other parties who allege that they have sustained damage. Defendants have denied coverage for these claims.

A. The Motions to Dismiss for Lack of In Personam Jurisdiction

INTRODUCTORY STATEMENT

Jurisdiction is the power of the sovereign through its court to act and affect the rights of others. The legal principal of jurisdiction developed in the field of social science from the fountainhead of private international law. Pragmatism and theory established the parameters within which a litigant could seek legal recourse within a sovereign

state. To commence a suit in early Anglo-American law, the litigant sought a writ from the sovereign. It had to be served on the defendant. The sheriff could only serve it within the sovereign's territory. The defendant had to be found there to be served. To exercise jurisdiction, the court must have power to enforce its judgments. Unless its officers can reach the person or property of a defendant, it cannot exercise control (power, jurisdiction) over him (or his property).

Today, jurisdiction must be juridically founded on the sovereign's territorial reach or nexus to an interest in the litigation. The sovereign is concerned with people and property in its territory. It has an interest in what they do and how they function. Due process requires that the interest nexus be reasonable and that the litigation be initiated in a reasonable procedural manner.

If the court (sovereign) can reach a defendant, it can adjudicate interests in his property although the property be beyond its territorial reach. If the property is in its territory, it can effect an absent party's interest in it so long as it acts reasonably in each instance. Jurisdictional power can be exercised in the absence of territorial reach over the persons or property of a defendant if the litigant expressly or impliedly gives consent. Consent satisfies the prerequisite of power and reasonableness.

Jurisdiction, then, depends on both power and due process. Constitutional due process plays two roles. First, it is a concept which recognizes the restriction that to affect the rights of a defendant, his person or property must be subject to the forum court's jurisdiction. A proceeding which results in a judgment in disregard of that restriction is not fair (apart from the fact that it is void) because (1) it does not honor the rule that requires each sovereign to abstain from trespassing on the jurisdiction and power of its sister state (a coordinate sovereign) and (2) it subjects an absent defendant to risk both in the state where he is situate and in the forum state. A judgment is not entitled to constitutional full faith and credit (or, in international fora, comity) unless it honors the restriction and abstains from the trespass.

Second, constitutional procedural due process requires (even when the court has power) that a defendant have notice of the claim and an opportunity to be heard. This requirement of fairness is based on a rationale that is unrelated to the sovereign's power. Where a proceeding does not afford these procedural prerequisites, the resultant judgment is not entitled to full faith and credit, not for want of power, but because the judgment is not enforceable even in the forum state where entered.

Notice and opportunity to be heard can be given to a defendant in or out of the state in in personam or in rem actions.

Power, however, requires a presence in the state. Historically, the requirement of presence has been satisfied by a variety of fictions. Serving a summons (notice and opportunity to be heard) on one transitorily passing through the state (driving from Philadelphia to New York) is sufficient although the traveller has no other relationship to the state and although the claim asserted is unrelated to the act of driving through the state. Sending solicitations for answers through the mail to New Jersey, advertising in a local publication, or other acts of "doing business" create a presence in New Jersey. As Justice Brandeis observed in Philadelphia & Reading Railway Co. v. McKibbin, 243 U.S. 264 (1917), all that is required is an "inference that it [the corporation] is present there." Conduct which substitutes for physical bodily presence is a fiction. The law is replete with fictions usually substituting for what was originally a real jural concept. Legal fictions are as old as the law itself, Blackstone's Commentary, Book III, pages 43 and 107; H. Maine, Ancient Law, pages 24 and 25 (London, 1861). Constructive treason, constructive possession, constructive annexation, constructive eviction, constructive knowledge, constructive trust, constructive bailment, constructive service all grew to fill voids when policy considerations made the

fictions necessary to satisfy the expansion of established doctrines.

Where there is a constructive presence and reasonable notice and opportunity to be heard, the constitutional mandate of full faith and credit extends the sovereign's reach beyond its territory. Enforcement is then effected by and in the sister state without the risk of relitigating the merits.

To satisfy the requirement of fairness (traditional notions of fair play and substantial justice) there have been a variety of legal theories which have constituted a "constructive presence." Following Pennoyer v. Neff, 95 U.S. 714 (1877) which dealt only with "power", instances came before the court constituting "contact" by non-residents with the forum. One concept involves the defendant's utilization or expectation of utilization of benefits from or in the forum state, that is, the "purposeful availment" doctrine. Another variant was: if defendant's conduct is "purposefully directed into the state without there being any physical contact, it is 'reasonable'." A defendant who "reached out beyond" its home state can be found in the forum state. The very documents that give rise to litigation may supply the requisite "availment" or "reaching out." Even its "choice of law" language can be a factor. Conduct by the defendant outside the forum which creates a reasonable expectation in the defendant or the plaintiff that the defendant be amenable

to suit within the forum is sufficient. So long as the expectation is a reasonable one, there is no unfairness in regarding the defendant's presence as constructively in the forum. The federal Constitution's effect on the sovereignty of the state sets both the limitations of due process and the expanse resulting from the full faith and credit clause.

International Shoe Co. v. Washington, 326 U.S. 310 (1945) substituted "contact" for presence so long as it did not offend traditional notions of fair play and substantial justice even though the contact was not contemporaneous with the time of service of process. McGee v. International Life Insurance Co., 355 U.S. 220 (1957) established that for due process purposes it was sufficient that the suit was based on a contact which had a substantial connection with the forum state. (The interest the state had in providing effective means of redress for its residents when the insurers refuse to pay claims.)

When Justice Jacobs wrote the opinion in J.W. Sparks & Co. v. Gallos, 47 N.J. 295, 299 (1966), he read International Shoe as going beyond the "fictive terminology" of "constructive presence" and "implied consent" which followed Pennoyer.

1. Consent and The "Territory of Coverage Rule"

Several out-of-state defendant insurance carriers whose policies do not refer to specific New Jersey sites and were not written in New Jersey, and who have no activities in New Jersey dispute the plaintiffs' assertion that a "Territory of Coverage Rule" subjects them to in personam jurisdiction in any state encompassed in the "policy territory" language in their insurance policies. The Auto Owner's Insurance Company, Celina Mutual Insurance Company, Commercial Union Assurance, General Casualty Company of Wisconsin, Royal Insurance Company of Canada, Canadian General Insurance Co., Unigard Security Insurance Co., and Wellington Insurance Company policies state that their "insurance applies to property . . . damage which occurs within the 'policy territory'." "Policy territory" is defined generally as ". . . United States of America . . ." or a variant that also requires that suit be brought within the policy territory. (Or in Wellington's case: "only within Canada and the Continental Limits of the United States of America . . ." is the "Territorial Limits", and "Policy Territory means: (1) Canada or the United States of America . . .").

Hoffman, Personal Jurisdiction over Alien Insurance Companies: The Territory of Coverage Rule, XXVI Tort & Insurance Law Journal, 703 (Summer 1991) is a logical

integration of the ratio decidendi of the cases it analyzed. It expresses sound social policy. It reviews the historical development of the minimum contact due process requirement as it applies to in personam jurisdiction over carriers in international insurance claims. In part, it shows how the minimum contact concept has passed though the "purposeful availment" concept to a "reasonable expectation" concept. It explains why less than a physical contact or physical nexus by the carrier meets due process standards. Even in instances where no express "territory of coverage" language appears in a policy, the courts sustain jurisdiction as being based on something akin to implied consent where the carrier by its very conduct anticipates being sued in the forum jurisdiction. Summarizing the rule and recognizing that a minority of U.S. courts hold to the contrary, Hoffman says: "Nevertheless, the majority of U.S. courts that have addressed the issue to date holds that the inclusion of the forum state in the territory of coverage of an insurance policy may support jurisdiction over an alien insurer." Id. at 709.

Rossman v. State Farm Mutual Automobile Insurance Co., 832 F.2d 282 (4th Cir. 1987) and N.J.A.F.I.U.A. v. Independent Fire Insurance Co., 253 N.J. Super. 75, 80 (Ch. Div. 1991) each takes cognizance of the territory of coverage language in the policies to find in personam jurisdiction. Judge Weiss did not take cognizance of that

issue in BOC v. Liberty Mutual, Union County Docket No. L-96840-88 (N.J. Super. Law Div. March 21, 1989). It was not raised there. Nevertheless, in his later opinion in Westinghouse Electric Corp. v. Liberty Mutual Insurance Co., Union County Docket No. L-069352-87 (N.J. Super. Law Div. September 4, 1991), even without consideration of such language he found in personam jurisdiction where the insurer should have known that it was insuring sites in New Jersey. He said that it had a reasonable expectation that it was insuring sites across the United States and, hence, was subject to being reached in any of those states.

In Westinghouse, as in many of the cases cited by Hoffman, the damage took place in the forum state. However, the rationale of those opinions is not based on that factor nor does that factor appear to be significant.

It is not unusual for the damage to occur in one state and the tortfeasor to be reached in another nor for a damage to flow into a state other than at an insured site where it had its genesis.

An agreement to cover claims anywhere in the United States or in any state in the United States or an agreement to cover claims where property damage occurs anywhere in the United States imports an obligation to go to and to appear in any state in the United States. It is de minimis an implied

consent to the "jurisdiction" of those states. If an insurer agrees to go anywhere in the United States to defend a claim there, it is surely foreseeable that the insurer may, in fact, be called upon to enter a formal appearance there. It is a waiver of the right of the insurer to assert the contention that there is a lack of in personam jurisdiction. It is itself a nexus with those states. It creates an expectation in the insured that the insurer is not beyond the reach of any of those states.

It is reasonable to find jurisdiction on that basis. For not only is there no frustration of the reasonable expectation of the insurer, but a contrary view would pose a frustration of the reasonable expectation of the insured. Claimants can pursue the insured in any state where the insured can be found or where its assets or property can be found. Claimants are not limited to assert claims in only such jurisdictions as the insurer may elect in which to have its insured sued. When considering what is reasonable, it does not matter that it is the insured who seeks declaratory judgment relief before it is sued by a claimant in the jurisdiction. The consent and waiver is in the contract with the insured. The insured can take advantage of it. Even if the language were to be so construed that the consent is limited to those instances where the claim is brought in the forum state, there would not be a due process problem nor

a problem of jurisdiction. At most, that would pose a contract coverage issue.

The declaratory judgment practice is to be encouraged. The insured ought not have to wait until it is sued to obtain a declaration of coverage. In fact, when the insured seeks declaratory judgment relief in any state, it subjects itself to being sued there by the claimant. The claimant may intervene to obtain the benefit of an adjudication of coverage. In any event, the claimant could assert its claim against the insured in that forum. In fact, to do complete justice, the claimant should be a party to the suit if subject to its jurisdiction. (As to the issue of non-joinder, see post). All of these consequences were not only foreseeable, but almost inevitable from the view of the insurer when it issued its policy.

In any event, there is nothing unreasonable or unduly burdensome on the insurer. The insurer, like any litigant, has a certain onus put upon it when sued in a foreign state. But where its "territory of coverage" language expressly embraces a state foreign to the state where the policy was entered into or the named site is situate, it voluntarily establishes contact with the states in its territory of coverage. When its insured is in a business that transports and disposes of toxic waste from a specified site, it is foreseeable that claims of damage may be expected to arise from any one of

a number of states through which or into which the toxic waste is transported or dumped or disposed. There is no offense to a notion of fair play or substantial justice to require it to appear where it has at least inferentially if not expressly agreed to appear. There is no more burden on the insurer to enter the foreign state when sued there by the insured in a declaratory judgment action than if "third partied" in by the insured if the insured were sued there. The language need not expressly provide for acceptance of service of process. It may from its nature imply the waiver of objection to jurisdiction.

Judge O'Brien writing for Chief Justice Cardozo, Justice Pound and their brothers in Gilbert v. Burnstein, 255 N.Y. 348, 174 N.E. 706 (1931) held with respect to in personam jurisdiction:

> "Consent is the factor that imparts power. Text writers have discussed this subject and have concluded from authorities that non-resident parties may in advance agree to submit to foreign jurisdiction. (Beale, The Jurisdiction of Courts Over Foreigners, 26 Harvard Law Review, 193; Freeman on Judgments (5th Edition), Vol. 3, p.3053; Goodrich, Conflicts of Laws, p. 141; Scott, Fundamentals of Procedure, pgs. 39-41). The last named author, speaking for non-

> residents, states: 'Jurisdiction over the person or by his consent...'."

Judge O'Brien also cited from the seminal Pennoyer v. Neff, 95 U.S. at 735, that consent by a non-resident even to a form of notification is not "contrary to natural justice" to bind one to a forum even though he has no actual notice let alone contact with the forum. When Justice Brandeis was reciting the old "doing business" rule in Philadelphia & Reading Railway Co. v. McKibbin, he took care to exclude the concept of consent saying: "In the absence of consent, the foreign corporation is amenable to process to enforce a personal liability only if is doing business within the state in such manner and to such extent as to warrant the inference that it is present there." 243 U.S. at 265. (Italics ours).

There is particular warrant for this rule in a complex, multi-party, multi-issue action. The rationale of the "territory of coverage" rule finds support in the DES cases (post) though they are tort and not contract cases. The plethora of mass multi-party, complex environmental cases and even the practice of insurers to seek to join all potentially involved parties suggests that the language in their policies be both interpreted and construed as their giving consent to suit in any of the states in their territories of coverage where companion litigation is pending.

The territory of coverage rule, standing alone, gives jurisdiction. It establishes a presence. It does it by consent. Even though the insurer may claim ignorance of that intention, or deny its voluntary submission to the jurisdiction, the legal consequence of the language in the broad context in which it was written is consensual constructive presence in personam in this jurisdiction.

2. **In Personam Jurisdiction Independent of the Territory of Coverage Rule**

Judge Weinstein's opinion in Ashley v. Abbott Laboratories, 789 F. Supp. 552 (E.D.N.Y. 1992) is a scholarly historical analysis of the equitization of the due process clause as it applies to in personam jurisdiction particularly in mass claim, multi-party cases. After reviewing the "Current Due Process Doctrine and Problems Raised by Its Application to Mass Torts", he traced the case law (including the "disingenuous and ambiguously" used concept of "consent") to the "Sovereignty, Fairness and Nexus Requirements." Recognizing the ever vacillating importance of the state's "interest nexus" and the state's "territorial nexus" as they play roles in the concept of in personam jurisdiction, the court, with respect to "mass torts" as distinguished from cases involving "only one or a few parties on each side", said: "Whereas there is a plausible rationale for the continued reliance on the 'forum state

interest' component of the sovereignty inquiry, the territorial nexus requirement is, at least in mass tort cases, an unnecessary and debilitating element of the fairness inquiry."

Recognizing the territorial nexus doctrine as an inadequate mechanism for insuring fairness and avoiding undue burdens on a defendant, particularly in massive litigation, the court accepted an interest nexus inquiry as adequate to satisfy due process in that DES context and perhaps in other mass tort cases. A two-step, five-factor grid was suggested "absent a defendant's consent". Interestingly, the analysis synthesizes the "jurisdiction issue" with factors common to "forum non conveniens" which, at bar, are treated, post. The factors must be weighed and considered in tandem.

At bar, this mass insurance coverage case is akin to a mass tort case. There are many common issues between the claims (as framed in the complaint) and coverage. The policy considerations of due process are alike. Considerations of the size and type of the litigation, the relative financial condition of the parties, the forum's interest in the bundle of litigation, the presence of indemnitors as the defendants, our ability to employ conflicts rules without requiring multiple suits in multiple jurisdictions at great expense and hardship to the litigants all mandate a suit in this jurisdiction. These are the factors to which Judge Weinstein referred.

New Jersey's long-arm rule, its liberal rules and practice of case management, and its very proximity to many sites makes it fair and reasonable to litigate the mass claims here. New Jersey also has a "sovereign interest" in the defendant carriers. One hundred and fifteen of the carriers, that is, 75% of the defendants, are involved in New Jersey "related" sites; that is in the seventeen sites which are located in New Jersey or involve Waste Management's New Jersey operations. The states have an interest in protecting the parties who are here under classic in personam rules from the burdens and ill consequences which they must bear if the litigation is fragmented by the inability to join some of the defendants.

New Jersey's interest nexus encompasses the movants because of the webb of coverage. In many instances, multiple carriers cover single sites. There is a strong judicial policy not to fragment litigation. Westinghouse v. Liberty Mutual Insurance, 233 N.J. Super. 463 (App. Div. 1989) spoke of the proscription of fragmenting actions and of the related litigation policies. Although the Waste Management conglomerate may not be as tightly knit as the Westinghouse organization and although the policies at bar are not as much an integrated "plan" as the policies in Westinghouse, the differences do not justify the utilization of different rules or concepts. Rarely in the interstitial development of law are cases "on all fours", especially in matters of jurisdiction and

due process. Analogies may be found in precedent. The same logic and social policy utilized in Westinghouse apply at bar. There is more warrant in insurance coverage cases to apply the progressive concept of Judge Weinstein than in substantive tort cases since it is in the coverage cases that relief affects not only the tort claimant, but also the insureds. Collaterally, it may also be that the exercise of control over a coverage case may well result in a dissipation of some, if not all, of the underlying tort claims. This is a sound judicial policy. There is historical precedent that coverage cases should be decided before the underlying tort claims since both the insured and the claimant have a right to know whether or not there is coverage. One of the purposes of insurance is to protect the insured from having to defend by itself.

For each of the foregoing reasons, the eight movants' motions are denied.

B. The Motions to Dismiss the Complaint or Stay the Action on the Grounds of Forum Non Conveniens

The doctrine of forum non conveniens bars litigation where a plaintiff has oppressively engaged in invidious forum shopping. Historically, it did not involve weighing of conveniences. Rather, the inquiry was whether the defendant would be subject to such injustice in defending the

action as would amount to vexation and oppression to which he would not be subject if the action were brought in another accessible court. Logan v. Bank of Scotland, 1 K.B. 141 (1905). Motions to dismiss on that ground had to be exercised "with very considerable caution." Id. at 150.

In Westinghouse, Judge Pressler reviewed the forum non conveniens rules applied in an environmental contamination insurance coverage action involving multiple claims and multiple sites in many states. Without repeating what was said under point A, supra, concerning the parallel between that case and the case at bar, suffice that Westinghouse sets forth the rules and principles which must be applied at bar. The court of the forum of plaintiff's choice prevails unless it is demonstrably inappropriate; that is, if a clear showing of real hardship or compelling reason is made. The standard is a demanding one. It involves a weighing of both private interest factors and public interest factors in the consideration affecting the administration of the court system.

Initially we note that pragmatically the operative contract language in the various insurance policies issued by the group of insurers at bar for the purpose of providing similar kinds of comprehensive coverage for nationwide risks should not be construed differently. Although they may not have been issued originally as part of a comprehensive plan,

the expectation of each insured with respect to common problems was the same. Those who handle contaminated waste and are engaged not only at a site, but in transportation and disposition of the contaminated waste material, necessarily become subject to liability in a variety of different states and seek broad coverage which follows them. The operation is interstate. Similarly, the insurance coverage must be as broad and for purpose of interpretation and construction should have a sense of uniformity. The various insurers are not strangers to the toxic waste industry.

The defendants have not demonstrated that this forum is demonstrably inappropriate either to process the issues in the litigation or to try the case fairly. They have not made a clear showing of real hardship. Concededly, Massachusetts is as capable as any other state of handling mass environmental insurance cases that come before it. But that is not the issue. The record at bar supports the arguments that our forum has a strong interest in this litigation; more sites are located here than in other states and we have an interest, a strong interest, in the issue of coverage; Waste Management has significant ties to this state; the defendant is not inconvenienced by litigating in New Jersey rather than in Massachusetts; New Jersey is centrally located and, in fact, Massachusetts cannot provide as comprehensive and as complete a resolution of this skein of claims as can New Jersey.

As Gulf Oil Corp. v. Gilbert says: "The application of the doctrine presupposes the existence of an alternative forum in which a defendant can properly be served with process." 330 U.S. 501 (1947); see also Forum Non Conveniens in State Court as Affected by Availability of Alternative Forum, 57 A.L.R. 4th 973. Massachusetts simply cannot provide as comprehensive a resolution as can New Jersey. An examination of its long-arm statute and the cases that have interpreted and applied it substantially restrict it to enumerated grounds on which to reach non-resident carriers. Particularly so where one of the sub-headings refers to "contracting to insure person, property or risk located within this commonwealth at the time of contracting." In contrast, New Jersey's rule is as broad as the Constitution permits. This court should be loathe to entertain an application which would result in the fragmenting of the claims and the parties. Chaffe, Bills of Peace with Multiple Parties, 45 Harv. L. Rev. 1297 (1932) paraphrases an excerpt from Swift, Gulliver's Travels. Chaffe said:

> "The King of Brobdingnag gave it for his opinion that, 'whoever who could make two ears of corn, or two blades of grass to grow upon a spot of ground where only one grew before, would deserve better of mankind, and do more essential service to his country than the whole race of politicians put together.' In

> matters of justice, however, the benefactor is he who makes one lawsuit grow where two grew before."

Massachusetts has not developed the one-action concept with the vigor found in our New Jersey cases. New Jersey by experience and liberal practice has the judicial techniques needed to engage in this complex litigation.

Almost one-quarter of the sites involved in the litigation are situate in New Jersey; no other state approaches this percentage of sites within its single border. Massachusetts, which is a proposed alternate forum, has only eight sites which is less than one-half of the number in New Jersey. Of the sites in issue, there is one in Arizona, Colorado, Georgia, Illinois, Louisiana, Maryland, Missouri and Canada; two are in South Carolina; three are in Delaware, Indiana, Oklahoma and Rhode Island; four are in Kentucky and New Hampshire; five are in Wisconsin; six are in Florida; seven are in Ohio; eight are in Massachusetts and New York; nine are in Pennsylvania; ten are in Michigan; and seventeen are in New Jersey.

There is strong precedent to support New Jersey's interest to remedy damage from toxic waste sites within its boundaries. Even apart from Johnson Maffey Inc. v. Pennsylvania Manufacturers Associations Insurance Co., 250 N.J. Super. 51, 57 (App. Div. 1991), the state's concern is

one in fact as well as in law. The record suggests that present estimates exceed $170 million to remedy some of the New Jersey sites. Further, Waste Management and its operations have as close an economic tie to New Jersey as does Westinghouse, a factor considered by Judge Pressler. It employs over 1,000 people in New Jersey; the Waste Management family paid more than $5 million in taxes and fees in 1990; its business contacts are spread throughout a great number of New Jersey municipal and other governmental entities. This apart from its private business.

To suggest that the defendant insurers are strangers to New Jersey would be unreal. Most of them are not only licensed to do business in New Jersey, but cover losses occurring in or are in litigation in this state. They have collectively benefitted in the billions of dollars from New Jersey premiums. The primary movant, Liberty Mutual, wrote over $140 million in New Jersey in 1989. In fact, many of them are engaged in litigation in other suits within our borders. Some, particularly those classified as the "London market" carriers, have service of suit clauses in which they consent expressly to appear here. As to others, judicial economy and the interests of all parties are best served by a one-action suit. See Cessna Aircraft Co. v. Fidelity Casualty Co., 616 F. Supp. 671, 675, particularly note 4 (D.N.J. 1985).

Plaintiffs' proofs in support of retaining jurisdiction here are weighty. They are weighty both in the sense of being voluminous and meticulously detailed and in a sense of being persuasive. In fact, even if the onus (which it is not) were on the plaintiff, it would satisfy such a burden.

The defendant's alternative proposal that the SCA and Waste Resources suits which are pending in Massachusetts should be continued there and severed from the instant suit does not rest on persuasive legal or factual grounds. Apart from being unable to show that New Jersey is demonstrably inappropriate, Liberty Mutual's presentation of the history of the suits pending in Massachusetts would still lead to an unwarranted fragmentation with the consequent doubling of energy and expense and the prospect of inconsistent results. Although the Massachusetts actions were started first, they were not designed to be comprehensive suits; it was only after New Jersey acquired the complex, multi-party, multi-issue action that a companion kind of suit was introduced by amendment in Massachusetts. This court is not as persuaded by a "first in time" rule as it is by the reasons heretofore advanced to retain the suit in its entirety in New Jersey. Liberty refers to four pending actions in Massachusetts. It is plaintiff in one and defendant in three. One involves a site in Illinois, one in New York, one in New Hampshire and one, the Gems site, which is in this action, is in New Jersey. The original Massachusetts action

included only two of the eleven Waste Management entities subject to liability for activities related to that site. All eleven of those entities are Plaintiffs in this action.

If Massachusetts had a compulsory joinder of claims and parties mandating that all litigants there exhaust all remedies of every kind by joining all parties that in any way relate to the subject matter, then comity may well warrant requiring the processing of litigation in Massachusetts. But there is no showing of such a requirement. Liberty argues that plaintiffs have not shown that there is a single defendant here that could not be joined there; but that is not plaintiffs' burden. There is no doubt that if all of the defendants joined here were joined in Massachusetts, they would be raising the same arguments of lack of in personam jurisdiction and forum non conveniens as are argued here. But, New Jersey has the better long arm and New Jersey has better precedent to support the complex litigation. The suit the Waste Management family is bringing in New Jersey is substantially distinguishable from the litigation that transpired historically in Massachusetts and as a plaintiff, Waste Management has the right to select a forum.

Forum selection, forum shopping, is not uncommon. Every plaintiff who has an opportunity to go the state and federal court must decide which forum to choose; every plaintiff who can bring an action in any one of a variety of

venues under various venue rules has the right to select which venue to use. The onus is always on the defendant to show that it cannot obtain a proper hearing in the venue of plaintiff's choice. It is only in the rare instance of removal to the federal court that the defendant is given the option of forum selection.

The time and energy spent in Massachusetts is not wasted in the New Jersey action. Such decisions as were made there are entitled to such precedential effect as is appropriate in this state; to the extent that there are issues of preemption, they will be recognized in this state. To the extent that there has been discovery, it has consequential residuals in this state.

Nor is this court concerned with the arguments which plaintiffs or defendants here have made in other forums which now prove to be internally inconsistent. Within each forum there is a proscription against a litigant "blowing hot and cold"; but, where matters arise that call for relitigation of basic issues and a court is called upon to weigh or reweigh enumerated factors, the positions which the parties may have taken elsewhere loses the foundation for estoppel. Each of the parties now before the court has at another time and at another place taken a position inconsistent with the position taken here.

This forum has admitted all of the out-of-state counsel who wish to participate. Their pro hac vice motions were granted. They and their clients will remain here.

The motion by Liberty Mutual and all others who have joined with them to dismiss or stay is denied.

C. **Motions to Dismiss on the Grounds of Forum Non Conveniens By Single Site Defendants**

Several defendants are in a position factually distinguishable from others in that they write only for local, single "Mom and Pop" insureds and they each wish to have their coverage issues litigated in the several jurisdictions from which they come. Essentially they are alleging they have been misjoined. Their objection is not under the forum non conveniens umbrella arguments, but one which simply says that they do not belong in this suit. They have not met the test for transfer on forum non conveniens. The findings and rulings on the motion of their co-defendants (under point B, supra) apply to them. They are burdened because they are involved and tried here with a multitude of other parties and claims. The burden does not warrant severance. The litigation is inconvenient to them, not the forum. Historically, the defendants' assertion would be that "the bill is multifarious". But they would fail to support their assertion. See Niemaseck v. Bernett Holding Co., Inc., 125

N.J. Eq. 284, 289 (Ch. Div. 1939). Even in Niemaseck, the court noted:

> "From of old, the practice of equity in respect to the joinder of parties and causes of action, has been much more liberal than at law. No rule universally applicable, or precise definition of multifariousness as an abstract proposition was formulated. 'Every case must be governed by its own circumstances: and as those are as diversified as the names of the parties, the court must exercise a sound discretion on the subject'."

Id. at 289.

It there recognized that the matter rested upon a consideration of what will best promote the administration of justice without multiplying unnecessary litigation on the one hand, or drawing suitors into needless, unnecessary expense on the other. The rules of joinder have become much more liberalized than in the past. When we followed the Federal Practice of 1948, we adopted the broadest rules of joinder of parties and causes. Where there was a burden, the remedy was not dismissal. It was to provide for separate trials or to seek other remedies less radical than dismissal. In fact, our rule, then and now, provides that for misjoinder there shall not be a dismissal, R.4:30. Severance can be ordered at any stage; common matters can be heard and then, if need be,

parties or causes can be tried seriatim. Ironically, in the litigation at bar, as to this point and as to prior points, although much has been said of case law, little direct attention has been given to the language and construction of our specific court rules. Our rules permit broad joinder of plaintiffs and broad joinder of causes and broad joinder of defendants; in their application under the real party in interest rule (our rule differing from the federal in that ours is not mandatory), we have allowed multiple parties to obtain relief even under the guise of "associations" without the necessity of complying with the formalities of class actions. Similarly, from what was originally a pre-trial practice and then became a case management practice, we have established the means within the litigation to provide mini-trials or summary actions or even through use of sanctions to avoid undue burdening of a defendant. Guidance from Westinghouse, 233 N.J. Super. at 470 et seq. is apposite.

Although the defendants assert that plaintiffs are allegedly separate regional legal entities with separate, non-integrated insurance programs covering risks in each specific region in which the individual legal entity operated, in reality plaintiff Waste Management, Inc., at least since 1971, has attempted to maintain for the benefit of itself and its subsidiaries a master general liability insurance program which involves layers of primary, umbrella and excess

liability insurance policies. Claims by the plaintiffs at bar seek coverage under some or all of those numerous policies. Even if some of the single-site insurers originally may have dealt with the separate strands of what is now a tangled cluster of claims, for litigation purposes much more can be gained in a single comprehensive suit than could be acquired by fragmentation. At this stage of the litigation, it would appear that claims against pre-acquisition insureds who are covered by insurers are inextricably bound into the present master program. In order to determine the entire scope of coverage afforded to any particular Waste Management entity, the court may have to look at both the policies that are common to all of the entities and to the prior policies issued exclusively to predecessors. This additional complexity may not have existed in Westinghouse, but that provides no reason for departing from its principles. As stated in Westinghouse: "The question is not how difficult it would be to try the coverage question, but rather how many times Westinghouse is going to have to repeat the process from jurisdiction to jurisdiction." 233 N.J. Super. at 439. Plaintiffs asserted and recently argued that the exposure of multiple insurers under multiple policies attached to almost every site. Whether this is so may be more fully developed as the litigation proceeds, but, for the present purposes, there is a strong appearance of that probability which itself warrants keeping the litigation intact.

For example, where Hanover seeks to have its action tried in Florida, it would appear that if that were done, its insured, who is insured by many other defendants on the same sites, would remain involved in multiple jurisdictions in multiple suits. There are other plaintiffs who with other carriers are subject to liability on claims emanating from those same sites.

Gulf Insurance which issued a policy to Gamrath Industries seeks to have the claim litigated in Indiana at the Marion Bragg site. However, Gulf is not the only insurer whose policies are issued at that site. In fact, Gamrath is seeking coverage under policies issued by thirty-five insurers other than Gulf.

In short, as the case progresses, there is the reasonable probability that there will be a multiplicity of common issues of policy interpretation including the primary and umbrella policies. Matters such as affirmative defenses predicated upon interpretation or construction of the various words of coverage or exclusion in the various policies may come before the court as common issues. In In Re Environmental Insurance Declaratory Judgment Actions, 252 N.J. Super. 510 (Law Div. 1991), Judge Weiss consolidated five entirely separate actions brought by distinct groups of policyholders for coverage at five separate lists of sites.

The motions are denied.

D. The Motions to Dismiss for Failure to Join Government Agencies or Other Claimants as Indispensable Parties

The failure to join governmental agencies is not a jurisdictional deficiency. Although the Declaratory Judgment Act provides that all persons who are interested by the declaration "shall" be made party to the proceeding, there is nothing to suggest that even a failure to do so warrants a dismissal. New Jersey allows most liberal pleading. It permits joinder, where possible, and prefers it to dismissal. There is no requirement of a case or controversy in the state court as there is in federal tribunals. Even absent the Declaratory Judgment Act, the instant action would lie. Our rules permit hypothetical pleading. There is a serious question as to whether under Winberry v. Salisbury, 5 N.J. 240 (1950), cert. denied, 340 U.S. 877 (1950), the procedural prerequisites of declaratory judgment have any jural efficacy since they appear in legislation. We have our own declaratory judgment rule and our own "Party" rules.

The statute must be construed realistically and liberally. Government agencies who have an immunity to suit and liability cannot be contemplated as indispensable

parties. To suggest otherwise would preclude environmental litigation coverage issues from being litigated for declaratory judgment relief in any state or federal court.

In any event, the action at bar involves a multitude of ripe claims. Those do not need "declaratory" relief.

With respect to the problem posed by the non-joinder of claimants, the court is confronted with a paradox. Ought we expand this complex mass suit to include even all the claimants who can be reached by our long arm? If they are not joined, how, if at all, may they be affected by any determinations that are made in this action? Under the amended One-Action Unitary Litigation Rule (see R.4:27(b) and R.4:28 and 29) and case law, must they be joined initially or is it sufficient during the case managing of the suit to deal with that matter if, as and when it more properly appears? If they are proper but not indispensable parties to the coverage issue, should the court be at all concerned that they have not been joined?

The problem is novel in a case of this magnitude. If they were all joined at this stage, the probability is that as the litigation progressed in one way or another through case management, there would be layers or categories of parties and claims. There is no prejudice by proceeding, at least for the time, without their joinder.

At this stage of the litigation on what is presently before the court, the court will not dismiss the suits for the failure to join the claimants or governmental agencies.

E. The Absolute Pollution Exclusion Rider in The American Empire Surplus Lines Insurance Company Policy

The declaration page on the Excess Liability Certificate of American Empire provides in Item 5:

> "Endorsements: This Certificate is subject to the following endorsements...absolute pollution liability exclusion endorsement No. 2...". Endorsement No. 2 "Absolute Pollution Liability Exclusion" provides: "It is hereby agreed and understood that this insurance does not apply to bodily injury or property damage arising out of the discharge, disbursal, release or escape of smoke, vapors, soot, fumes, acids, alkalies, toxic chemicals, liquids or gases, waste materials or other irritants, contaminants or pollutants into or upon land, the atmosphere or any water course or body of water."

The body of the policy provides under Exclusions:

> "Notwithstanding anything contained herein to the contrary, it is specifically understood and agreed that coverage under the certificate shall not apply: 1. To bodily injury or property damage arising out of the discharge, disbursal, release or escape of smoke, vapors, soot, fumes, acids, alkalies, toxic materials, liquids or gases, waste materials or other irritant, contaminants or pollutants into or upon land, the atmosphere or any water course or body of water; but this exclusion does not apply if such discharge, disbursal, release or escape is sudden and accidental;..." (Italics ours).

Under the printed body, the exclusion does not apply in certain instances. Unless the discharge ... is sudden and accidental, there is pollution liability coverage in the body of the policy. It is introduced by the language "Notwithstanding anything contained herein to the contrary...". The endorsement language on the policy excludes all pollution liability coverage.

The carrier seeks a summary judgment.

Defendant cannot say that it is entitled to judgment as a matter of law where the language poses the ambiguity. De minimis there must be a hearing to determine whether in fact the language poses a genuine issue of fact. It may eventuate

that the matter is one of interpretation and construction, and, therefore, purely a question of law. However, this cannot be resolved without an evidentiary hearing. A hearing may disclose a genuine fact controversy. It may warrant rescission or reformation. On its face, the policy receives strict construction against the carrier who wrote it; if there were an express reference in the Rider to the clause being amended, the ruling might be otherwise. But such is not the case at bar. Both the body of the exclusionary clause and Rider No. 2 use words of exclusion. But the body qualifies the exclusion. And the body provides that it should apply, "Notwithstanding anything contained herein to the contrary," **The motion for Summary Judgment is denied at this stage of the litigation.**

F. **Plaintiff's Motion to Dismiss the Counterclaim of American Motorists Insurance Company**

American Motorists seeks to enjoin the plaintiff from proceeding against it in New Jersey because of an agreement entered into between it and Waste Management Inc. in October 1986 which, among other things, provided that any coverage litigation between the parties be instituted in a state or federal court in the state of Illinois which court was therein referred to as the "agreed upon forum." The agreement arose because of controversy between the parties

with respect to whether and to what extent the policies may be applicable in connection with the various types of liability claims based on or arising out of the generation, transportation, storage or disposal of and/or the presence, emission or discharge into the environment of toxic, hazardous or injurious wastes, chemicals and/or pollutants. Among other things, the parties were in disagreement with respect to the manner of form of the delivery of notice of claims. The term of the agreement was expressed as: "This agreement shall have a term of one (1) year from the date above first written."

Subsequent to the expiration of the one year, Waste Management continued to send notices to its insurer referring in each notice to the agreement and purporting to send the notice pursuant to that agreement. After about one year, another agreement was entered into between the parties. It purported to replace the loss reporting requirements of the prior written agreement. It was silent, however, as to restrictions on recourse to litigation in forums other than Illinois. Relying on the original "standstill" agreement and the facts incident to it, plaintiff seeks to dismiss the counterclaim.

Historically, agreements which related to control over litigation were illegal. They usurped the court's function. Over a period of time, the law gave recognition to the rights

of potential litigants to enter into agreements which affected the processing of litigation so long as they were reasonable. On its face, the subject matter of the agreement appears to be reasonable. The law favors recourse to alternatives to litigation and supports attempts to set up procedures for the settlement or narrowing of justiciable claims.

In the case at bar, the issue which the court must resolve is broader than whether the agreement was reasonable when entered into or whether the restriction with respect to the litigation in any forum other than Illinois extends beyond the one-year period of the original agreement. The issue is whether it is reasonable from the facts at bar to give any recognition to that agreement. That agreement, so far as can be gathered from what is before the court, contemplated litigation that would only involve the two parties and which would not concern others. At bar, all of the factors which militate against fragmentation of the litigation make it unreasonable to grant injunctive relief to the defendant even if the agreement lived beyond the year. The merger of law and equity into the one action allows the defendant by counterclaim to seek injunctive relief, but, as in all cases in Chancery, the granting of all equitable relief is discretionary. It involves a weighing of a variety of factors. Here, it is not the defendant who is coming before the court for ad interim or interlocutory injunctive relief. It is the plaintiff who seeks to bar the defendant from even

having that opportunity. In order for the plaintiff to be entitled to that extraordinary relief, he must establish either that on its face the counterclaim fails to state a claim under R. 4:6-2(e) or that he is entitled to Summary Judgment. Since matters dehors the pleadings have been submitted and must be considered by the court, the only issue is one of Summary Judgment. To recover on Summary Judgment, the movant must demonstrate that there is (palpably) no genuine issue as to any material fact in dispute and that he is entitled to judgment as a matter of law. If we accept the full presentation of the factual complex submitted by the defendant, it still follows that **as a matter of law the counter claim must be dismissed**. It would be unreasonable, vexatious, inequitable and contrary to sound judicial administrative practice to fragment that part of the suit. Defendant has shown nothing to suggest that there is either a lack of jurisdiction or that, in fact, the doctrine of forum non conveniens warrants relief. The defendant relies solely on the agreement. To allow parties to produce a result which the court under its control would not produce utilizing principles of forum non conveniens constitutes an undue burden on the judiciary's ability not only to case manage complex litigation, but to do essential fairness between the parties under circumstances as they exist at the time of litigation as distinct from what may have existed at the time of the agreement. Equity does not tolerate, let alone produce, unconscionable results. In a multi-party,

complex environmental coverage suit all parties are at risk where a fragmenting of one splinter to a foreign jurisdiction produces the potential for inconsistent judicial determinations that affect claims of the named litigants. The same policy factors which proscribe fragmentation overweigh the defendant's right to injunctive relief.

The plaintiff's motion to dismiss the counterclaim is granted.

Plaintiffs shall submit an order in accordance with this Opinion.

The order will not resolve all of the rights of all of the parties and, therefore, is interlocutory. It is subject to R.4:42-2 and R.4:50. As and if the circumstances warrant, it can be altered by motions or case management.

The restraint against duplicative litigation is continued.

The temporary committee shall promptly form its liaison or lead committee and propose a First Case Management Consent Order.

SUPREME COURT OF NEW JERSEY
A-9/10 September Term 1993

WASTE MANAGEMENT, INC., and its present and former subsidiaries, WASTE MANAGEMENT, INC. OF FLORIDA; WASTE MANAGEMENT OF ALABAMA, INC.; WASTE MANAGEMENT OF ARIZONA, INC.; WASTE MANAGEMENT OF COLORADO, INC.; WASTE MANAGEMENT OF CONNECTICUT, INC.; WASTE MANAGEMENT OF DELAWARE, INC.; WASTE MANAGEMENT OF ILLINOIS, INC.; WASTE MANAGEMENT OF KENTUCKY, INC.; WASTE MANAGEMENT OF MAINE, INC.; WASTE MANAGEMENT OF MARYLAND, INC.; WASTE MANAGEMENT OF MASSACHUSETTS, INC.; WASTE MANAGEMENT OF MICHIGAN, INC.; WASTE MANAGEMENT OF NEW HAMPSHIRE, INC.; WASTE MANAGEMENT OF NEW YORK, INC.; WASTE MANAGEMENT OF NORTH AMERICA, INC.; WASTE MANAGEMENT OF OHIO, INC,; WASTE MANAGEMENT OF OKLAHOMA, INC.; WASTE MANAGEMENT OF PENNSYLVANIA, INC.; WASTE MANAGEMENT OF SOUTH CAROLINA, INC.; WASTE MANAGEMENT OF WISCONSIN, INC.; WMI SAFETY SERVICES, INC.; WMI WASTE MANAGEMENT OF CANADA, INC.; CHEMICAL WASTE MANAGEMENT, INC.; CHEMICAL WASTE MANAGEMENT OF NEW JERSEY, INC.; CHEMICAL WASTE MANAGEMENT OF KANSAS, INC.; SCA SERVICES, INC.; SCA DISPOSAL

SERVICES OF NEW ENGLAND, INC.; SCA SERVICES OF INDIANA, INC.; SCA SERVICES OF PENNSYLVANIA, INC.; ALDERFER & FRANK, INC.; CARL GULICK, INC.; CHEM-NUCLEAR SYSTEMS, INC.; CLEAN HARBORS OF BRAINTREE, INC.; CWM CHEMICAL SERVICES, INC.; HAZCO INTERNATIONAL, INC.; INDIANA WASTE SYSTEMS, INC.; INSTANT DISPOSAL SERVICES, INC.; INTERSTATE WASTE REMOVAL CO., INC.; LANDFILL & DEVELOPMENT COMPANY; MICHIGAN LANDFILL HOLDINGS, INC.; MODERN TRASH REMOVAL OF YORK, INC.; NU-WAY TRASH REMOVAL CORP.; OHIO WASTE SYSTEMS, INC.; REFUSE SERVICES, INC.; RITE-WAY SERVICE INC.; S.C.R. SYSTEMS, INC.; SANITARY LANDFILL, INC.; THE O'CONNOR CORPORATION; WASTECONTROL OF FLORIDA, INC.; WASTE DISPOSAL, INC.; WASTEQUID, INC.; WASTE RESOURCES CORPORATION; WASTE RESOURCES OF TAMPA BAY, INC.; WM ACQUIRING CORP.,

Plaintiffs-Respondents,

v.

THE ADMIRAL INSURANCE COMPANY, AETNA CASUALTY & SURETY COMPANY; AETNA CASUALTY COMPANY OF CANADA; ALLIANZ INSURANCE COMPANY; ALLIANZ UNDERWRITERS INSURANCE COMPANY; ALLSTATE INSURANCE COMPANY; AMERICAN CASUALTY COMPANY OF

READING, PENNSYLVANIA; AMERICAN EMPIRE SURPLUS COMPANY; AMERICAN EMPLOYERS' INSURANCE COMPANY; AMERICAN HOME ASSURANCE COMPANY; THE AMERICAN INSURANCE COMPANY; AMERICAN MOTORISTS INSURANCE COMPANY; AMERICAN NATIONAL FIRE INSURANCE COMPANY; AMERICAN POLICYHOLDERS' INSURANCE COMPANY; AMERICAN REINSURANCE COMPANY; ARGONAUT INSURANCE COMPANY; ASSOCIATED INDEMNITY CORPORATION; ASSOCIATED INTERNATIONAL INSURANCE COMPANY; BIRMINGHAM FIRE INSURANCE COMPANY OF PENNSYLVANIA; C.E. HEATH COMPENSATION AND LIABILITY INSURANCE COMPANY; CALIFORNIA UNION INSURANCE COMPANY; THE CAMDEN FIRE INSURANCE ASSOCIATION; THE CELINA MUTUAL INSURANCE COMPANY; CENTRAL NATIONAL INSURANCE COMPANY OF OMAHA; CENTURY INDEMNITY COMPANY; CHICAGO INSURANCE COMPANY; CIGNA PROPERTY AND CASUALTY INSURANCE COMPANY; COLUMBIA CASUALTY COMPANY; COMMERCIAL UNION INSURANCE COMPANY; CONSTITUTION STATE INSURANCE COMPANY; CONTINENTAL CASUALTY COMPANY; THE CONTINENTAL INSURANCE COMPANY; CRUM AND FORSTER INSURANCE COMPANY; EMPLOYERS INSURANCE OF WAUSAU A MUTUAL COMPANY; EMPLOYERS LIABILITY ASSURANCE CORPORATION, LIMITED; EMPLOYERS MUTUAL CASUALTY COMPANY; EMPLOYERS REINSURANCE

CORPORATION; ERIC REINSURANCE COMPANY; EVANSTON INSURANCE COMPANY; FEDERAL INSURANCE COMPANY; THE FIDELITY AND CASUALTY COMPANY OF NEW YORK; FIREMAN'S FUND INSURANCE COMPANY; FIREMEN'S INSURANCE COMPANY OF NEWARK, NEW JERSEY; FIRST STATE INSURANCE COMPANY; FREMONT INDEMNITY COMPANY; GENERAL ACCIDENT INSURANCE COMPANY OF AMERICA; GENERAL CASUALTY COMPANY OF WISCONSIN; GIBRALTAR CASUALTY COMPANY; GLOBE INDEMNITY COMPANY; GRANITE STATE INSURANCE COMPANY; GREAT AMERICAN INSURANCE COMPANY; GULF INSURANCE COMPANY; THE HANOVER INSURANCE COMPANY; HARLEYSVILLE MUTUAL INSURANCE COMPANY; HARTFORD ACCIDENT AND INDEMNITY COMPANY; HARTFORD CASUALTY INSURANCE COMPANY; HIGHLANDS INSURANCE COMPANY; THE HOME INDEMNITY COMPANY; THE HOME INSURANCE COMPANY; HUDSON INSURANCE COMPANY; INDIANA INSURANCE COMPANY; INSURANCE COMPANY OF NORTH AMERICA; THE INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA; INTERNATIONAL INSURANCE COMPANY; INTERNATIONAL SURPLUS LINES INSURANCE COMPANY; INTERSTATE FIRE & CASUALTY COMPANY; LEXINGTON INSURANCE COMPANY; LIBERTY MUTUAL INSURANCE COMPANY; MARYLAND CASUALTY COMPANY; NATIONAL AMERICAN INSURANCE COMPANY OF CALIFORNIA; NATIONAL FIRE INSURANCE

COMPANY OF HARTFORD; NATIONAL GRANGE MUTUAL INSURANCE COMPANY; NATIONAL SURETY CORPORATION; NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PA.; NEW ENGLAND INSURANCE COMPANY; NEW ENGLAND REINSURANCE CORP.; THE NORTH RIVER INSURANCE COMPANY; THE NORTHERN ASSURANCE COMPANY OF AMERICA; NORTHWESTERN NATIONAL INSURANCE COMPANY; THE OHIO CASUALTY INSURANCE COMPANY; OLD REPUBLIC INSURANCE COMPANY; PACIFIC EMPLOYERS INSURANCE COMPANY; PENNSYLVANIA MANUFACTURERS' ASSOCIATION INSURANCE COMPANY; PHOENIX ASSURANCE COMPANY OF NEW YORK; PLANET INSURANCE COMPANY; POTOMAC INSURANCE COMPANY OF ILLINOIS; PRUDENTIAL REINSURANCE COMPANY; PURITAN INSURANCE COMPANY; RANGER INSURANCE COMPANY; RELIANCE INSURANCE COMPANY; ROYAL INDEMNITY COMPANY; ROYAL INSURANCE COMPANY OF AMERICA; SAFETY NATIONAL CASUALTY COMPANY; SECURITY INSURANCE COMPANY OF HARTFORD; SELECTIVE INSURANCE COMPANY OF AMERICA; THE SHELBY INSURANCE COMPANY; STONEWALL INSURANCE COMPANY; ST. PAUL FIRE AND MARINE INSURANCE COMPANY; THE ST. PAUL INSURANCE COMPANY; ST. PAUL MERCURY INSURANCE COMPANY; ST. PAUL SURPLUS LINES INSURANCE COMPANY; TRANSAMERICA INSURANCE COMPANY; TRANSPORTATION INSURANCE COMPANY; THE

TRAVELERS INDEMNITY COMPANY; THE TRAVELERS INDEMNITY COMPANY OF RI; TWIN CITY FIRE INSURANCE COMPANY; UNIGARD SECURITY INSURANCE COMPANY; UNITED FIRE & CASUALTY COMPANY; UNITED STATES FIDELITY AND GUARANTY COMPANY; UNITED STATES FIRE INSURANCE COMPANY; VANLINER INSURANCE COMPANY; ZURICH INSURANCE COMPANY (US); UNDERWRITERS AT LLOYDS, LONDON; AND OTHER COMPANIES, INCLUDING: ALLIANZ INTERNATIONAL INSURANCE COMPANY LIMITED; BELLEFONTE INSURANCE COMPANY; BERMUDA FIRE & MARINE INSURANCE COMPANY LIMITED; COMPAGNIE D'ASSURANCES MARITIMES AERIENNES & TERRESTRES, S.A.; DART INSURANCE COMPANY LIMITED; DOMINION INSURANCE COMPANY LIMITED; EL PASO INSURANCE COMPANY LIMITED; EXCESS INSURANCE COMPANY LIMITED; FOLKSAM INTERNATIONAL INSURANCE COMPANY (UK) LIMITED; HEDDINGTON INSURANCE COMPANY (UK) LIMITED; LEXINGTON INSURANCE COMPANY; LONDON AND EDINBURGH GENERAL INSURANCE COMPANY LIMITED; MENTOR INSURANCE COMPANY (UK) LIMITED; MUTUAL REINSURANCE COMPANY LIMITED; NEW HAMPSHIRE INSURANCE COMPANY; PACIFIC AND GENERAL; SOUTHERN AMERICAN INSURANCE COMPANY; SOVEREIGN MARINE & GENERAL INSURANCE COMPANY LIMITED; SOVEREIGN MARINE & GENERAL INSURANCE COMPANY LIMITED "C" A/C; SOVEREIGN MARINE & GENERAL

INSURANCE COMPANY LIMITED NO. 12 A/C; STOREBRAND INSURANCE COMPANY (UK) LIMITED; STRONGHOLD INSURANCE COMPANY LIMITED; ST. KATHERINE INSURANCE COMPANY LIMITED; ST. KATHERINE INSURANCE COMPANY LIMITED (X A/C); TAISHO MARINE & FIRE INSURANCE COMPANY (UK) LIMITED; TERRA NOVA INSURANCE COMPANY; TERRA NOVA INSURANCE COMPANY LIMITED; TOKIO MARINE & FIRE INSURANCE COMPANY (UK) LIMITED; TUREGUM INSURANCE COMPANY; WALBROOK INSURANCE COMPANY LIMITED; WINTERTHUR SWISS INSURANCE INSURANCE COMPANY; AND YASUDA FIRE AND MARINE INSURANCE COMPANY (UK) LIMITED,

Defendants,

and

AUTO-OWNERS INSURANCE COMPANY; CANADIAN GENERAL INSURANCE COMPANY; COMMERCIAL UNION ASSURANCE COMPANY OF CANADA; ROYAL INSURANCE COMPANY OF CANADA; and WELLINGTON INSURANCE COMPANY;

Defendants-Appellants.

Argued September 28, 1983 -- Decided October 13, 1994

On appeal from the Superior Court, Appellate Division.

John R. Casolaro, a member of the New York bar, argued the cause for appellants Canadian General Insurance Company, Commercial Union Assurance Company of Canada, and Royal Insurance Company of Canada (Pearson and Shapiro, Herrick, Feinstein, and Wilson, Elser, Moskowitz, Edelman & Dicker, attorneys).

Eric Proshansky argued the cause for appellant Wellington Insurance Company (Tenzer, Greenblatt & Zunz, attorneys).

John A. Yeager, a member of the Michigan bar, argued the cause for appellant Auto Owners Insurance Company (Haggerty, Donohue & Monaghan, attorneys; Mr. Yeager and Walter E. Monaghan on the brief).

David M. Jones, a member of the Massachusetts bar, argued the cause for respondents (Kerby, Cooper, English, Danis & Garvin, attorneys; Mr. Jones and Jerry Fitzgerald English, on the briefs).

Michael R. Mararil submitted a brief on behalf of amicus curiae Township of West

Milford New Jersey (Anderson, Kill, Olick & Oshinsky, attorneys).

Carol A. Stevens submitted a brief on behalf of amici curiae The American Insurance Association and The National Association of Independent Insurers (Watson, Stevens, Fiorilla & Rutter, attorneys).

The opinion of the Court was delivered by CLIFFORD, J.

On this interlocutory appeal, two rulings of the trial court raise issues of first impression. In denying defense motions to dismiss this declaratory-judgment action, the court held, first, that a "territory of coverage" clause in an insurance policy, without more, is a sufficient basis on which to rest in personam jurisdiction over a nonresident insurance carrier. With that holding the trial court became the only court in this or any other jurisdiction to declare that a "territory of coverage" clause standing alone confers jurisdiction over an alien insurer. Second, the trial court held that New Jersey's "interest nexus" in resolving massive environmental insurance-coverage cases comprehensively can, by itself, confer personal jurisdiction over foreign carriers with no ties whatsoever to this state.

Because we conclude that both holdings are erroneous, we vacate the trial court's order and remand for entry of judgment for defendants-apellants.

I

Plaintiffs are Waste Management, Inc. fifty-four of its present subsidiaries, and one of its former subsidiaries. They are engaged in the disposal of solid- and hazardous-waste products. Plaintiffs are subject to environmental damage claims by customers, governmental agencies, and others. Defendants, various insurers of plaintiffs, have denied coverage for those claims. Plaintiffs therefore brought this declaratory-judgment action to establish liability coverage for pollution-related damage at ninety-seven sites in twenty-two states and Canada. Seventeen of those sites lie in New Jersey.

Among the 150 defendant insurers are out-of-state carriers that have conducted no activities of any sort in New Jersey and whose policies, written elsewhere, contain no reference to New Jersey risks. Each of the policies, however, contain a "territory of coverage" clause, generally extending coverage to the United States and Canada. Examples of such clauses are: "The policy applies only to bodily injury or property damage * * * [that] occurs during the policy term as stated in the Declarations within the United States of America, its territories or possessions, Canada or Mexico * * *," and "This policy covers only within Canada and the Continental Limits of the United States of America (excluding Alaska)."

Many of the out-of-state insurers brought motions to have the declaratory-judgment action dismissed, principally on grounds of lack of personal jurisdiction and forum non conveniens. When the trial court denied the motions to

dismiss, five of the defendant insurers sought leave to appeal to the Appellate Division, which that court denied. We grant leave to appeal, 133 N.J. 414-15 (1993).

The five carriers before us on this appeal have no connection with New Jersey, but their policies all contain "territory of coverage" clauses providing liability coverage for losses occurring in the United States or Canada. Four of those carriers are referred to as the Canadian Insurers: Canadian General Insurance Company, Commercial Union Assurance Company of Canada, Royal Insurance Company of Canada, and Wellington Insurance Company. The Canadian Insurers do no business in New Jersey, are not licensed to do business in New Jersey, and claim that they issued their respective policies only after ascertaining that their single insured in this litigation conducted operations in Canada alone. That insured, WMU Waste Management of Canada, Inc. (Waste Management of Canada), is neither licensed to do business in New Jersey nor involved in sites related to New Jersey. The sole site insured by the Canadian Insurers lies in Ontario and is the subject of litigation in that province's Supreme Court. Waste Management of Canada seeks, as part of this suit in New Jersey, a declaration that the Canadian Insurers are liable for any judgment entered by the Supreme Court of Ontario.

The Canadian Insurers appeal the denial of their motions to dismiss on both the jurisdiction and forum non conveniens issues. They argue that they will suffer irreparable injury, as contemplated by Rule 2:2-2(b) governing interlocutory appeals to this Court, if the decision

below is sustained. They content that if forced to defend in New Jersey on the coverage issue, they will lose the right to contest the resulting judgment in Canadian courts; that Canada is the appropriate forum because the insuring transaction and any insured event took place in Canada, where the site and the witnesses are located; and that subjecting them to the cost and complexity of this tangled litigation is unfair.

The fifth carrier on this appeal, Auto Owners Insurance Company (Auto Owners), raises only the claim that New Jersey courts lack jurisdiction over it. Auto Owners is not authorized, licensed, or qualified to do business in New Jersey, nor has it ever issued a policy to a New Jersey domiciliary or insured any risks located in this state. It is a Michigan corporation that issued policies to businesses that operate waste-disposal facilities and conduct local waste-hauling activities in Michigan. It asserts that it has no minimum contacts with New Jersey and that the "territory of coverage" clause does not by itself afford a basis of jurisdiction.

II

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The basic question is whether the trial court's determination that New Jersey has personal jurisdiction over these defendants runs afoul of due-process considerations. Our discussion of that issue starts with a restatement of some fundamental propositions.

If a cause of action arises directly out of a defendant's contacts with the forum state, the court's jurisdiction is "specific." Lebel v. Everglades Marina, Inc., 115 N.J. 317, 322 (1989). If, however, the suit is not related directly to the defendant's contacts with the forum state, but is based instead on the defendant's continuous and systematic activities in the forum, then the Sate's exercise of jurisdiction is "general." Id. at 323; see also Helicopteros Nacionales de Colum., S.A. v. Hall, 466 U.S. 408, 414 n.9 104 S. Ct. 1868, 1872 n.9, 80 L.Ed.2d 404, 411 n.9 (1984) (discussing general jurisdiction).

In Hanson v. Denckla, 357 U.S. 235, 251, 78 S. Ct. 1228, 1238, 2 L. Ed. 2d 1283, 1296 (1958), the Supreme Court, striking down an exercise of personal jurisdiction over out-of-state defendants, pointed to a shift from the rigid rule of Pennover v. Neff, 95 U.S. 714, 24 S. Ct. 565, 24 L. Ed. 565 (1878), which had required actual presence in a state, to a more flexible standard of "minimum contacts" under International Shoe v. Washington, 326 U.S. 310, 66 S. Ct. 154, 90 L. Ed. 95 (1945). "Minimum contacts" are the threshold requirements for specific personal jurisdiction. Hanson, supra, 357 U.S. Dat 253, 78 S. Ct. at 1239-40, 2 L. Ed. 2d at 1298. "[I]t is essential that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum state, thus invoking the benefit and protection of its laws." Id. at 253, 78 S. Ct. at 1240, 2 L. Ed. 2d at 1298 (citing

International Shoe, supra, 326 U.S. at 319, 66 S. Ct. at 159, 90 L. Ed. at 103).

In World-Wide Volkswagen v. Woodson, 444 U.S. 286, 100 S. Ct. 559, 62 L. Ed. 2d 490 (1980), the Supreme Court clarified the purposes of the "minimum contacts" doctrine: to protect a defendant against litigating in an inconvenient forum and to ensure that the States not exceed their jurisdictional limits under our federal system. Id. at 291-92, 100 S. Ct. at 564, 62 L. Ed. 2d at 498. The first interest, that of ensuring against litigating in inconvenient forums, requires that "maintenance of the suit' * * * not offend "traditional notions of fair play and substantial justice."'" Id. at 292, 100 S. Ct. at 564, 62 L. Ed. 2d at 498 (quoting International Shoe, supra, 326 U.S. at 316, 66 S. Ct. at 154, 90 L. Ed. at 102 (quoting Milliken v. Meyer, 311 U.S. 457, 463, 61 S. Ct. 339, 342, 85 L. Ed. 278, 283 (1940))). That end is achieved through the requirement that "[t]he relationship between the defendant and the forum * * * be such that it is 'reasonable * * * to require the corporation to defend the particular suit which is brought there.'" Ibid. (quoting International Shoe, supra, 326 U.S. at 317, 66 S. Ct. at 158, 90 L. Ed. at 102 (omission in original)). The second interest, the jurisdictional limitations, "has been relaxed substantially over the years" because of the "fundamental transformation in the American economy." Id. at 292-93, 100 S. Ct. at 565, 62 L. Ed. 2d at 498. Nonetheless, minimum contacts remain the threshold requirement of the jurisdiction. Id. at 293, 100 S. Ct. at 565-66, 62 L. Ed. 2d at 499-500.

Critical to the due-process analysis is the question whether the defendant should reasonably anticipate being haled into court in the forum state. Burger King Corp. v. Rudzewicz, 471 U.S. 462, 474, 105 S. Ct. 2174, 2183, 85 L. Ed. 2d 528, 542 (1985). The record must demonstrate that the defendant has purposefully availed itself of the privilege of engaging in activities within the forum state, thereby gaining the benefits and protections of its laws. Id. at 475, 105 S. Ct. at 2183, 85 L. Ed. 2d at 542. In that way defendants are protected against being haled into court in a foreign jurisdiction solely on the basis of random, fortuitous, or attenuated contacts or as a result of the unilateral activity of some other party. Ibid.

Once the court finds that a defendant has purposefully established minimum contacts within the forum state, other factors, such as the State's interests in adjudicating the suit and the plaintiff's interest in obtaining relief, may properly be weighed in determining whether those minimum contacts establish jurisdiction consistent with considerations of fair play and substantial justice. Those considerations may even "serve to establish the reasonableness of jurisdiction upon a lesser showing of jurisdiction than would otherwise be required." Id. at 477, 105 S. Ct. at 2184, 85 L. Ed. 2d at 543-44. However, a court may not weigh those other factors until it has found that the defendant has experienced sufficient minimum contacts to satisfy the threshold determination.

In Burger King, the Supreme Court considered whether a "contract with an out-of-state party alone can

automatically establish sufficient minimum contacts in the other party's forum." 417 U.S. at 478, 105 S. Ct. at 2185, 85 L. Ed. 2d at 545. "[T]he answer," the Court declared, "clearly is that it cannot." Ibid. That answer is based on the fact that a contract is "'ordinarily but an intermediate step serving to tie up prior business negotiations with future consequences which themselves are the real object of the business transaction.'" Id. at 479, 105 S. Ct. at 2185, 85 L. Ed. 2d at 545 (quoting Hoopeston Canning Co. v. Cullen, 318 U.S. 313, 317, 63 S. Ct. 602, 604-05, 87 L. Ed. 777, 782 (1943)). Thus, "in determining whether the defendant purposefully established minimum contacts with the forum," courts must consider such factors as "prior negotiations and contemplated future consequences, along with the terms of the contract and the parties' actual course of dealing." Id. at 479, 105 S. Ct. at 2185, 85 L. Ed. a2d at 545.

In Asahi Metal Industry Co. v. Superior Court of California, 480 U.S. 102, 107 S. Ct. 1026, 94 L. Ed. 2d 92 (1987), the Supreme Court affirmed the rule that the substantial connection between the defendant and the forum state necessary for a finding of minimum contacts "must come about by an action of the defendant purposefully directed toward the forum State." Id. at 112, 107 S. Ct. at 1032, 94 L. Ed. 2d at 104. The Court also listed several factors for courts to evaluate when determining the reasonableness of an exercise of jurisdiction: the burden on the defendant, the interest of the forum state, the plaintiff's interest in obtaining relief, the interstate judicial systems interest in efficient

resolution of controversies, and the shared interest of the States in furthering fundamental substantive social policies. Id. at 113, 107 S. Ct. at 1033, 94 L. Ed. 2d at 105. Moreover, when the suit involves an alien defendant, a court must be "unwilling[] to find the serious burdens on an alien defendant outweighed by minimal interests on the part of the plaintiff or the forum State." Id. at 115, 107 S. Ct. at 1034, 94 L. Ed. 2d at 106.

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Ensuring that an application of the minimum-contacts test satisfied the jurisdictional requirement of due process calls for a case-by-case analysis of a defendant's relationship with the forum state. Charles Gendler & Co. v. Telcom Equip. Corp., 102 N.J. 460, 470 (1986). That analysis has two parts. The first is to determine whether minimum contacts exist at all. That first step "ensures that a state's grasp does not exceed its jurisdictional reach," and, in doing so, protects the primary interest of the restriction: preserving "the defendant's liberty interest in not being subject to the entry of a judgment in a jurisdiction with which the defendant does not have sufficient minimum contacts." Ibid. The second part of the analysis is to weigh "the sufficiency of the contacts for jurisdictional purposes[, which] depends on 'the relationship among the defendant, the forum, and the litigation * * * .'" Id. at 471 (quoting Shaffer v. Heitner, 433 U.S. 186, 204, 97 S. Ct. 2569, 2580, 53 L. Ed. 2d 683, 698 (1977) (omission in original)).

The sufficiency of those contacts depends on "the purposeful act of the defendant, not the unilateral activity of another who merely claims a relationship to the defendant." Ibid. In weighing the sufficiency of the contacts, this Court considers whether the cause of action arose out of the defendant's contacts within this State. If the two are related, the contacts support the exercise of jurisdiction. Ibid. If the cause of action is unrelated to the contacts, "the defendant's contacts must be so continuous and substantial as to justify subjecting the defendant to jurisdiction." Id. at 472. The more the defendant has purposefully directed its activities to the forum state, and the greater the benefits it has received from its contacts within the forum state, the more reasonable the exercise of jurisdiction becomes. Id. at 473.

The Supreme Court has established a trend of "'expanding the permissible scope of state jurisdiction over foreign corporations and other nonresidents.'" Ibid. (quoting McGee v. International Life Ins. Co., 355 U.S. 220, 222, 78 S. Ct. 199, 201, 2 L. Ed. 2d 223, 226 (1957)). "Focusing on the foreseeability of being haled into court," id. at 475, the Court adopted the stream-of-commerce theory as an "independent basis to satisfy the minimum-contacts standard." Id. at 476. In Gendler, we adopted that theory, noting that it would not subject local retailers and distributors to foreign jurisdiction, because unlike the markets of major distributors, the local operators' foreseeable market is constrained. Id. at 477. Moreover, a defendant that "prohibits distribution of its

products in a particular state would not reasonably expect its products to be sold in that state," id. at 481, and would therefore not be subject to the jurisdiction of that state on a stream-of-commerce theory.

If, however, the minimum-contacts threshold is met through the actions of the defendant without regard to the plaintiff's unilateral activities, a court, in considering the relationship between the defendant, the forum, and the litigation, may then consider the plaintiff's residence in the forum state to determine whether the defendant's contacts to that forum state justify an exercise jurisdiction. In Lebel, supra, we found that a Florida seller of a luxury boat became subject to this State's jurisdiction when he telephoned his New Jersey buyer, mailed the contract of sale to New Jersey, and received payment from New Jersey. We concluded that those facts supported an exercise of specific jurisdiction over that sale, because "the defendant purposely directed his activities at the forum state." 115 N.J. at 327. Thus, we held that a "'plaintiff's residence in the forum may, because of defendant's relationship with the plaintiff, enhance the defendant's contacts with the forum.'" Id. at 327 (quoting Keeton v. Hustler Magazine, Inc., 465 U.S. 770, 780, 104 S. Ct. 1473, 1481, 79 L. Ed. 2d 790, 801 (1984)).

Such a finding of enhancement of defendant's contacts must be based on the relationship of the plaintiff's residence in the forum state to the transaction with the defendant that gives rise to the suit -- that is, the defendant must avail itself of the plaintiff's residence in the

transaction. Put differently, the defendant must be aware that the transaction "will have direct consequences in [the forum state] such that it should [be] aware of the possibility of litigation arising in that forum." Id. at 328. In measuring the defendant's expectations concerning that possibility, we consider the facts of the case under the World-Wide Volkswagen standard of reasonable anticipation of being haled into court. See Lebel, supra, 115 N.J. at 330.

Once the defendant is found to have minimum contacts to the forum, "the 'fair play and substantial justice' inquiry must still be made." Id. at 328. That inquiry places the burden on the defendant to make a "'compelling case'" that some consideration makes the exercise of jurisdiction unreasonable. Ibid. (quoting Burger King, supra, 471 U.S. at 477, 105 S. Ct. at 2184, 85 L. Ed. 2d at 544. In Lebel, we gave as examples of such considerations the factors listed in Asahi, supra, 480 U.S. at 113, 107 S. Ct. at 1034, 94 L. Ed. 2d at 105: the burden on the defendant, the interests of the forum state, the plaintiff's interest in obtaining relief, the interstate judicial system's interest in efficient resolution of disputes, and the shared interest of the states in furthering fundamental substantive social policies. We further observed that the burden of a defendant coming to the plaintiff's state, as opposed to the plaintiff going to the defendant's home state, is too slight an imbalance to defeat jurisdiction. Id. at 328-29. As the Appellate Division has properly noted, "In actions based on contract, plaintiff's selection of forum will not be disturbed except in the most

exceptional of circumstances, in recognition of the fact that such transactions have 'evidential roots in several jurisdictions.'" Star Video Entertainment v. Video U.S.A. Asocs., 253 N.J. Super. 216, 226-27 (1992) (citation omitted) (quoting Starr v. Berry, 25 N.J. 573, 587 (1958)). In those suits based on contract in which the defendant has minimum contacts to the forum state, we look to whether the forum is manifestly inappropriate or chosen for purposes of vexation or harassment. Id. at 227.

III

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The Supreme Court cases discussed above reveal a common thread in their factual determinations on the existence of minimum contacts. In Hanson, supra, the Court ruled that no minimum contacts with Florida existed when the defendant, an administrator of a trust, had no offices or trust assets and did no business or solicitation in Florida. 357 U.S. at 251, 78 S. Ct. at 1238, 2 L. Ed. 2d at 1296. The defendant in World-Wide Volkswagen, supra, who had made no attempt to serve the Oklahoma market or avail itself of the privileges and benefits of Oklahoma law, was held not to have had minimum contacts sufficient to support that State's exercise of jurisdiction. 444 U.S. at 295, 100 S. Ct. at 566, 62 L. Ed. 2d at 500. In Asahi, supra, the defendant was found to have no minimum contacts to California when it did not purposely avail itself of the California market and had no

control over the distribution system that brought its products to California. 480 U.S. at 112-13, 107 S. Ct. at 1032, 94 L. Ed. 2d at 105. In contrast is the defendant in Burger King, supra, who had accepted a Florida franchise, had reached out to Florida to avail himself of the benefits of doing business there, had voluntarily accepted a Florida corporation's regulation of his business, and had agreed to a Florida choice-of-law provision in the contract. He was found to have had minimum contacts sufficient to justify an exercise of jurisdiction by Florida. 471 U.S. at 479-80, 105 S. Ct. at 2186, 85 L. Ed. 2d at 545-56.

The foregoing cases demonstrate that the existence of minimum contacts turns on the presence or absence of intentional acts of the defendant to avail itself of some benefit of a forum state. An intentional act calculated to create an actionable event in a forum state will give that state jurisdiction over the actor. Calder v. Jones, 465 U.S. 783, 791, 104 S. Ct. 1482, 1488, 79 L. Ed. 2d 804, 813 (1984) (publishing libelous article in magazine sold in California, and causing greatest degree of harm in California, gave that state jurisdiction over reporter and editor). A defendant may constructively consent to the personal jurisdiction of a state court through voluntary use of certain procedures of that state. Insurance Corp. of Ire. v. Compagnie des Bauxites de Guinea, 456 U.S. 694, 704, 102 S. Ct. 2099, 2105, 72 L. Ed. 2d 492, 502 (1982). Jurisdiction may be created through a contract that has substantial connections to the forum state. McGee, supra, 355 U.S. at 223, 78 S. Ct. at 201, 2 L. Ed. 2d at 226 (holding that insurance contract delivered in California to

a California resident, and premiums mailed from California created sufficient contacts to support finding of jurisdiction on contract). Similarly, an arbitration clause evidences consent to in personam jurisdiction for orders compelling arbitration. Victory Transp. Inc. v. Comisaria Gen., 336 F.2d 354, 363 (2nd Cir. 1964).

However, not every act of a potential defendant is sufficient to satisfy the jurisdictional requirement of intentional availment. "[M]ere purchases, even if occurring at regular intervals, are not enough to warrant a State's assertion of jurisdiction over a nonresident [defendant] in a case of action not related to those purchase transactions." Helicopteros, supra, 466 U.S. at 418, 104 S. Ct. at 1874, 80 L. Ed. 2d at 413. The Ninth Circuit has decided that a nonresident defendant insurer's "failure to structure its policy to exclude the possibility of defending a suit wherever an injured claimant requires medical care cannot * * * fairly be characterized as an act by which [defendant] has purposefully availed itself of the privilege of conducting activities in California." Hunt v. Erie Ins. Group, 728 F.2d 1244, 1247 (1984). We adopt the proposition that absent a duty to act, "purposeful availment" of the privileges of a forum state cannot normally include what a nonresident defendant has failed to do. Finally, if a suit contains multiple defendants, their individual contacts to the forum state cannot be aggregated to find minimum contacts for a single defendant. Similarly, jurisdiction over one defendant may not be based on the activities of another defendant, nor on the plaintiff's connection to the forum state. The requirements

of minimum contacts analysis "must be met as to each defendant over whom a state court exercises jurisdiction." Rush v. Savchuk, 444 U.S. 320, 332, 100 S. Ct. 571, 579, 62 L. Ed. 2d 516, 527 (1980).

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In light of the foregoing analysis, we consider the Canadian Insurers' and Auto Owners' contacts to New Jersey. The Canadian Insurers engage in no activity in this state, are not licensed to do business in New Jersey, and they insured Waste Management of Canada only after ascertaining that their insured had no operations in this country. The sole connection to New Jersey found by the trial court was the "territory of coverage" clause contained in the Canadian Insurers' contracts. We hold that in the absence of a forum-related event, a "territory of coverage" clause alone does not create a sufficient basis on which to rest jurisdiction in this state. See, e.g., Farmers Ins. Exch. v. Portgage La Prairie Mut. Ins. Co., 907 F.2d 911, 913-14 (9th Cir. 1990); Rossman v. State Farm Mut. Auto Ins. Co., 832 F.2d 282, 286 (4th Cir. 1987); Commonwealth of Puerto Rico v. The SS Zoe Colocotroni, 628 F.2d 652, 668 (1st Cir. 1980); Batton v. Tennessee Farmers Mut. Ins. Co., 736 P.2d 2, 6 (Ariz. 1987); Meyer v. Auto Club Ins. Ass'n, 492 So. 2d 1314, 1316 (Fla. 1986); Guardian Royal Exch. Assurance v. English China Clays, P.L.C., 815 S.W.2d 223, 227 (Tex. 1991). We recognize both the trend to expand the scope of jurisdiction over nonresidents and the special interest that a state may have in the field of insurance, see Avdel

Corp. v. Mecure, 58 N.J. 264, 272 (1971), but those circumstances do not obviate the need to meet the threshold requirement for personal jurisdiction, namely, that the defendant create minimum contacts with this state by purposefully availing itself of some benefit of doing business here. Because no contacts exist between New Jersey and the Canadian Insurers, those defendants cannot be made subject to this State's personal jurisdiction. We therefore do not reach the "fair play and substantial justice" inquiry.

Similarly, we find no contacts by defendant Auto Insurers with New Jersey. As with the Canadian Insurers, Auto Insurers has insured entities that have no connection of their own to this state. Its insureds' sole tie to New Jersey is their parent conglomerate. That does not satisfy the requirement of the insurer's purposeful availment of the benefits and privileges of doing business in New Jersey. Because we again conclude that the threshold requirement of minimum contacts is absent, we do not consider whether jurisdiction could be exercised consistent with "traditional notions of fair play and substantial justice." As a result, our state courts may not exercise jurisdiction over defendant Auto Insurers.

IV

We need not dwell at length on the trial court's alternative basis for finding jurisdiction over these non-domiciliary defendants, namely, that even without a "territory of coverage" clause, New Jersey courts could

assert in personam jurisdiction over nonresident insurers on the basis of this State's interest in not fragmenting massive litigation. According to the court, the contact establishing a "substantial connection" with the forum state in New Jersey's interest "in providing effective means of redress for its residents when the insurers refuse to pay claims." Even assuming the validity of the trial court's theory, plaintiffs-insureds in this action against defendants-appellants are all nonresidents seeking coverage for environmental damage occurring beyond New Jersey's borders. Moreover, the rulings of the Supreme Court and of this Court, as discussed above, require at least some minimum contact of the defendant with the forum asserting in personam jurisdiction.

The trial court's reliance on the ruling of the federal district court in Ashley v. Abbott Laboratories, 789 F. Supp. 548 (E.D.N.Y. 1992) (hereinafter DES Cases), for a contrary result is misplaced. In that case, the court fashioned a progressive jurisdictional approach to find nonresident manufacturers of the drug diethylstilbestrol (DES) amenable to a massive products-liability action brought in New York. The DES Cases test for mass torts requires a determination of whether the forum has an appreciable interest in the litigation and, if so, whether the defendant would experience a relatively substantial hardship were it required to defend in the forum state. Id. at 587. Comparing the massive insurance-coverage case before us to a mass-tort case, the trial court ruled that "sound judicial policy" justified application of the DES Cases test to insurance-coverage cases "since it is in the

coverage cases that relief affects not only the tort claimant, but also the insureds."

The trial court's analogy breaks down in several critical areas. DES Cases was premised on the existence of a uniform tort of massive proportions involving a single generic product, DES, with a uniform mechanism of injury. Here, each insurer's liability will be governed by the specific terms of its own contracts of insurance. Second, without DES Cases' unprecedented jurisdictional formulation, harm caused to New York residents because of exposure to DES during pregnancy in all likelihood would have gone unremedied because no other forum embraced the "market share" theory of product liability, as developed by the New York Court of Appeals in Hymowitz v. Eli Lilly & Co., 539 N.E.2d 1069, cert. denied, 493 U.S. 944, 110 S.Ct. 350, 107 L. Ed. 2d 338 (1989). DES Cases, supra, 789 F.Supp. at 576. Accordingly, the Des Cases' holding was limited strictly to actions brought by New York plaintiffs for injuries occurring in New York. Id. at 569.

In this case, other, perhaps even more appropriate, forums were available to the nonresident plaintiffs had they chosen to litigate the coverage claims separately. Most significantly, the court in DES Cases, despite its rejection of traditional "minimum contacts" analysis, rested its holding to a large extent on the theory that the nonresident DES manufacturers were participants and derived benefits from a national DES market whose alleged harms to plaintiffs in a major market segment

(New York) were reasonably foreseeable to the defendants.

Similarly misplaced is the trial court's reliance on the Appellate Division's opinion in Westinghouse Electric Corp. v. Liberty Mutual Ins. Co., 233 N.J. Super. 463 (1989), another massive environmental-insurance coverage case. In that case, Westinghouse brought two declaratory-judgment actions against 144 American and foreign insurance carriers for coverage of pollution liability at eighty-one sites located in twenty-three states. The policies had been issued over the course of a twenty-five-year period as part of Westinghouse's integrated corporate-insurance program. The Appellate Division determined that "[i]t is only the single comprehensive action, designed to adjudicate the entire controversy between the litigants, [that] can protect both the court and the parties" from the "subversive" effects of "piecemeal litigation" and "fractionalization." Id. at 470-71. The trial court in this case recognized that Westinghouse was not "on all fours" with the case before us, but concluded that the differences between the two cases "do not justify the utilization of different rules or concepts." However, the trial court appears to have skipped over the most significant distinction: in Westinghouse, no question existed that in personam jurisdiction had been properly exercised over all the parties. Westinghouse addressed issues of forum non conveniens and case-management, not of jurisdiction. Id. at 465-66.

The requisite due-process analysis must focus principally on substantial justice and fundamental fairness, not on economy and convenience. New Jersey's "interest nexus" therefore cannot serve as an independent basis for assertion of in personam jurisdiction.

V

In light of our disposition of the jurisdiction issue, we do not reach the Canadian Insurers' claim that they are entitled to a dismissal on grounds of forum non conveniens, the merits of which we perceive to be flimsy at best. See D'Agostino v. Johnson & Johnson, 115 N.J. 491, 495-97 (1989); Westinghouse Elec. Corp., supra, 233 N.J. Super. at 469-70.

VI

The order of the trial court is vacated and the cause remanded to the Law Division for entry there of a judgment of dismissal in favor of defendants-appellants.

Chief Justice Wilentz and Justices Handler, Pollock, Garibaldi, and Stein join in this opinion. Justice O'Hern has filed a separate concurring opinion.

WASTE MANAGEMENT, INC., and its
present and former subsidiaries,
WASTE MANAGEMENT INC. OF FLORIDA;
WASTE MANAGEMENT OF ALABAMA, INC.;
WASTE MANAGEMENT OF ARIZONA, INC.;
WASTE MANAGEMENT OF COLORADO, INC.;
WASTE MANAGEMENT OF CONNECTICUT,
INC.; WASTE MANAGEMENT OF DELAWARE,
INC.; WASTE MANAGEMENT OF ILLINOIS,
INC.; WASTE MANAGEMENT OF KENTUCKY,
INC.; WASTE MANAGEMENT OF MAINE,
INC.; WASTE MANAGEMENT OF MARYLAND,
INC.; WASTE MANAGEMENT OF
MASSACHUSETTS, INC.; WASTE
MANAGEMENT OF MICHIGAN, INC.; WASTE
MANAGEMENT OF NEW HAMPSHIRE, INC.;
WASTE MANAGEMENT OF NEW YORK, INC.;
WASTE MANAGEMENT OF NORTH AMERICA,
INC.; WASTE MANAGEMENT OF OHIO,
INC.; WASTE MANAGEMENT OF OKLAHOMA,
INC.; WASTE MANAGEMENT OF
PENNSYLVANIA, INC.; WASTE
MANAGEMENT OF SOUTH CAROLINA, INC.;
WASTE MANAGEMENT OF WISCONSIN,
INC.; WMI SAFETY SERVICES, INC.;
WMI WASTE MANAGEMENT OF CANADA
INC.; CHEMICAL WASTE MANAGEMENT,
INC.; CHEMICAL WASTE MANAGEMENT OF
NEW JERSEY, INC.; CHEMICAL WASTE
MANAGEMENT OF KANSAS, INC.; SCA

SERVICES, INC.; SCA DISPOSAL SERVICES OF NEW ENGLAND, INC.; SCA SERVICES OF INDIANA, INC.; SCA SERVICES OF NEW JERSEY, INC.; SCA SERVICES OF PENNSYLVANIA, INC.; ALDERFER & FRANK, INC.; CARL GULICK, INC.; CHEM-NUCLEAR SYSTEMS, INC.; CLEAN HARBORS OF BRAINTREE, INC.; CWM CHEMICAL SERVICES, INC.; HAZCO INTERNATIONAL, INC.; INDIANA WASTE SYSTEMS, INC.; INSTANT DISPOSAL SERVICE, INC.; INTERSTATE WASTE REMOVAL CO., INC.; LANDFILL & DEVELOPMENT COMPANY; MICHIGAN LANDFILL HOLDINGS, INC.; MODERN TRASH REMOVAL OF YORK, INC.; NU-WAY TRASH REMOVAL CORP.; OHIO WASTE SYSTEMS, INC.; REFUSE SERVICES, INC.; RITE-WAY SERVICE INC.; S.C.R. SYSTEMS, INC.; SANITARY LANDFILL, INC.; THE O'CONNOR CORPORATION; WASTECONTROL OF FLORIDA, INC.; WASTE DISPOSAL, INC.; WASTEQUID, INC.; WASTE RESOURCES CORPORATION; WASTE RESOURCES OF TAMPA BAY, INC.; WM ACQUIRING CORP.,

Plaintiffs-Respondents,

v.

THE ADMIRAL INSURANCE COMPANY, AETNA CASUALTY & SURETY COMPANY; AETNA CASUALTY COMPANY OF CANADA;

ALLIANZ INSURANCE COMPANY; ALLIANZ UNDERWRITERS INSURANCE COMPANY; ALLSTATE INSURANCE COMPANY; AMERICAN CASUALTY COMPANY OF READING, PENNSYLVANIA; AMERICAN EMPIRE SURPLUS LINES INSURANCE COMPANY; AMERICAN EMPLOYERS' INSURANCE COMPANY; AMERICAN HOME ASSURANCE COMPANY; THE AMERICAN INSURANCE COMPANY; AMERICAN MOTORISTS INSURANCE COMPANY; AMERICAN NATIONAL FIRE INSURANCE COMPANY; AMERICAN POLICYHOLDERS' INSURANCE COMPANY; AMERICAN RE-INSURANCE COMPANY; ARGONAUT INSURANCE COMPANY; ASSOCIATED INDEMNITY CORPORATION; ASSOCIATED INTERNATIONAL INSURANCE COMPANY; BIRMINGHAM FIRE INSURANCE COMPANY OF PENNSYLVANIA; C.E. HEATH COMPENSATION AND LIABILITY INSURANCE COMPANY; CALIFORNIA UNION INSURANCE COMPANY; THE CAMDEN FIRE INSURANCE ASSOCIATION; THE CELINA MUTUAL INSURANCE COMPANY; CENTRAL NATIONAL INSURANCE COMPANY OF OMAHA; CENTURY INDEMNITY COMPANY; CHICAGO INSURANCE COMPANY; CIGNA PROPERTY AND CASUALTY INSURANCE COMPANY; COLUMBIA CASUALTY COMPANY; COMMERCIAL UNION INSURANCE COMPANY; CONSTITUTION STATE INSURANCE COMPANY; CONTINENTAL CASUALTY COMPANY; THE CONTINENTAL INSURANCE

COMPANY; CRUM AND FORSTER INSURANCE COMPANY; EMPLOYERS INSURANCE OF WAUSAU A MUTUAL COMPANY; EMPLOYERS LIABILITY ASSURANCE CORPORATION, LIMITED; EMPLOYERS MUTUAL CASUALTY COMPANY; EMPLOYERS REINSURANCE CORPORATION; ERIC REINSURANCE COMPANY; EVANSTON INSURANCE COMPANY; FEDERAL INSURANCE COMPANY; THE FIDELITY AND CASUALTY COMPANY OF NEW YORK; FIREMAN'S FUND INSURANCE COMPANY; FIREMEN'S INSURANCE COMPANY OF NEWARK, NEW JERSEY; FIRST STATE INSURANCE COMPANY; FREMONT INDEMNITY COMPANY; GENERAL ACCIDENT INSURANCE COMPANY OF AMERICA; GENERAL CASUALTY COMPANY OF WISCONSIN; GIBRALTAR CASUALTY COMPANY; GLOBE INDEMNITY COMPANY; GRANITE STATE INSURANCE COMPANY; GREAT AMERICAN INSURANCE COMPANY; GULF INSURANCE COMPANY; THE HANOVER INSURANCE COMPANY; HARLEYSVILLE MUTUAL INSURANCE COMPANY; HARTFORD ACCIDENT AND INDEMNITY COMPANY; HARTFORD CASUALTY INSURANCE COMPANY; HIGHLANDS INSURANCE COMPANY; THE HOME INDEMNITY COMPANY; THE HOME INSURANCE COMPANY; HUDSON INSURANCE COMPANY; INDIANA INSURANCE COMPANY; INSURANCE COMPANY OF NORTH AMERICA; THE INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA; INTERNATIONAL

INSURANCE COMPANY; INTERNATIONAL SURPLUS LINES INSURANCE COMPANY; INTERSTATE FIRE & CASUALTY COMPANY; LEXINGTON INSURANCE COMPANY; LIBERTY MUTUAL INSURANCE COMPANY; MARYLAND CASUALTY COMPANY; NATIONAL AMERICAN INSURANCE COMPANY OF CALIFORNIA; NATIONAL FIRE INSURANCE COMPANY OF HARTFORD; NATIONAL GRANGE MUTUAL INSURANCE COMPANY; NATIONAL SURETY CORPORATION; NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PA.; NEW ENGLAND INSURANCE COMPANY; NEW ENGLAND REINSURANCE CORP.; THE NORTH RIVER INSURANCE COMPANY; THE NORTH AMERICAN ASSURANCE COMPANY OF AMERICA; NORTHWESTERN NATIONAL INSURANCE COMPANY; THE OHIO CASUALTY INSURANCE COMPANY; OLD REPUBLIC INSURANCE COMPANY; PACIFIC EMPLOYERS INSURANCE COMPANY; PENNSYLVANIA MANUFACTURERS' ASSOCIATION INSURANCE COMPANY; PHOENIX ASSURANCE COMPANY OF NEW YORK; PLANET INSURANCE COMPANY; POTOMAC INSURANCE COMPANY OF ILLINOIS; PRUDENTIAL REINSURANCE COMPANY; PURITAN INSURANCE COMPANY; RANGER INSURANCE COMPANY; RELIANCE INSURANCE COMPANY; ROYAL INDEMNITY COMPANY; ROYAL INSURANCE COMPANY OF AMERICA; SAFETY NATIONAL CASUALTY COMPANY; SECURITY INSURANCE COMPANY

OF HARTFORD; SELECTIVE INSURANCE COMPANY OF AMERICA; THE SHELBY INSURANCE COMPANY; STONEWALL INSURANCE COMPANY; ST. PAUL FIRE AND MARINE INSURANCE COMPANY; THE ST. PAUL INSURANCE COMPANY; ST. PAUL MERCURY INSURANCE COMPANY; ST. PAUL SURPLUS LINES INSURANCE COMPANY; TRANSAMERICA INSURANCE COMPANY; TRANSPORTATION INSURANCE COMPANY; THE TRAVELERS INDEMNITY COMPANY; THE TRAVELERS INDEMNITY COMPANY OF RI; TWIN CITY FIRE INSURANCE COMPANY; UNIGARD SECURITY INSURANCE COMPANY; UNITED FIRE & CASUALTY COMPANY; UNITED STATES FIDELITY AND GUARANTY COMPANY; UNITED STATES FIRE INSURANCE COMPANY; VANLINER INSURANCE COMPANY; ZURICH INSURANCE COMPANY (US); UNDERWRITERS AT LLOYDS, LONDON; AND OTHER COMPANIES, INCLUDING: ALLIANZ INTERNATIONAL INSURANCE COMPANY LIMITED; BELLEFONTE INSURANCE COMPANY; BERMUDA FIRE & MARINE INSURANCE COMPANY LIMITED; COMPAGNIE D'ASSURANCES MARITIMES AERIENNES & TERRESTRES, S.A.; DART INSURANCE COMPANY LIMITED; DOMINION INSURANCE COMPANY LIMITED; EL PASO INSURANCE COMPANY LIMITED; EXCESS INSURANCE COMPANY LIMITED; FOLKSAM INTERNATIONAL INSURANCE COMPANY (UK) LIMITED; HEDDINGTON INSURANCE COMPANY (UK) LIMITED;

LEXINGTON INSURANCE COMPANY; LONDON AND EDINBURGH GENERAL INSURANCE COMPANY LIMITED; MENTOR INSURANCE COMPANY (UK) LIMITED; MUTUAL REINSURANCE COMPANY LIMITED; NEW HAMPSHIRE INSURANCE COMPANY; PACIFIC AND GENERAL; SOUTHERN AMERICAN INSURANCE COMPANY; SOVEREIGN MARINE & GENERAL INSURANCE COMPANY LIMITED; SOVEREIGN MARINE & GENERAL INSURANCE COMPANY LIMITED "C" A/C; SOVEREIGN MARINE & GENERAL INSURANCE COMPANY LIMITED NO. 12 A/C; STOREBRAND INSURANCE COMPANY (UK) LIMITED; STRONGHOLD INSURANCE COMPANY LIMITED; ST. KATHERINE INSURANCE COMPANY LIMITED; ST. KATHERINE INSURANCE COMPANY LIMITED (X A/C); TAISHO MARINE & FIRE INSURANCE COMPANY (UK) LIMITED; TERRA NOVA INSURANCE COMPANY; TERRA NOVA INSURANCE COMPANY LIMITED; TOKIO MARINE & FIRE INSURANCE COMPANY (UK) LIMITED; TUREGUM INSURANCE COMPANY; WALBROOK INSURANCE COMPANY LIMITED;WINTERTHUR SWISS INSURANCE COMPANY; and YASUDA FIRE AND MARINE INSURANCE COMPANY (UK) LIMITED,

Defendants,

and

AUTO-OWNERS INSURANCE COMPANY; CANADIAN GENERAL INSURANCE COMPANY; COMMERCIAL UNION ASSURANCE COMPANY OF CANADA; ROYAL INSURANCE COMPANY OF CANADA; and WELLINGTON INSURANCE COMPANY;

Defendants-Appellants.

O'HERN, J., concurring.

I concur in the judgment of the Court. The exercise of jurisdiction in this case would offend the traditional notions of fair play and substantial justice that infuse the Due Process Clause of the Fourteenth Amendment of the United States Constitution. I disagree, however, that a territory-of-coverage clause in an insurance policy is insufficient to establish the minimum contacts that make up the first prong of the two-part test for determining when jurisdiction may be exercised over a non-resident defendant.

I need not set forth the principles recently restated in cases such as Lebel v. Everglades Marina, Inc., 115 N.J. 317 (1989). Suffice it to stay with the basics:

> [D]ue process requires only that in order to subject a defendant to a judgment in personam, if [the defendant] be not present within the territory of the forum, [the defendant] have certain minimum contacts with it such that the maintenance of the suit does not offend

"traditional notions of fair play and substantial justice."

[International Shoe Co. v. Washington, 326 U.S. 310, 316, 66 S. Ct. 154, 158 90 L. Ed. 95, 102 (1945) (quoting Milliken v. Meyer, 311 U.S. 457, 463, 61 S. Ct. 339, 342, 85 L. Ed. 278, 283 (1940)).]

In the context of specific jurisdiction (a lawsuit related to the contacts), the minimum-contacts requirement must result from the defendant's purposeful conduct, not from the unilateral activities of the plaintiff. Lebel, supra, 115 N.J. at 323. A territory-of-coverage clause can establish the minimum contacts sufficient to sustain jurisdiction. The Texas Supreme Court has held:

> [W]hen the nonresident defendant is an insurance company, the following factors, when appropriate, should be considered when determining whether the nonresident defendant has purposely established "minimum contracts" with the forum state: (a) the insurer's awareness that it was responsible to cover losses arising from a substantial subject of insurance regularly present in the forum state; and (b) the nature of the particular insurance contract and its coverage.
>
> [Guardian Royal Exch. Assurance Ltd. v. English China Clays, P.L.C., 815 S.W.2d 223, 227 (1991).]

Applying the Guardian decision in Malaysia British Assurance v. El Paso Reyco, Inc., 830 S.W.2d 919 (Tex. 1992), the court explained that a policy that would reinsure a primary insurance company for claims, including those of some Texas residents, established a "twice-removed contact with" Texas and as such was not sufficient for in personam jurisdiction. Id. at 91; see also Domtar, Inc. v. Niagara Fire Ins. Co., 518 N.W.2d 58, 62 (Minn. Ct. App.), review granted, ____ N.W.2d ___ (1994) (holding that non-resident insurer "should have expected coverage disputes [in the Minnesota territory of coverage] to be resolved in the same forum as the underlying action."). Under those principles, a territory-of-coverage clause would establish the minimum contacts sufficient to sustain jurisdiction in New Jersey.

In this multi-faceted litigation, however, the New Jersey coverage issues now appear minor, at best. At the time of the Law Division decision in this case, a thesis of insurance-coverage disputes was that policies could contain a global declaration of coverage. See Westinghouse Elec. Corp. v. Liberty Mut. Ins. Co., 233 N.J. Super. 463, 476 (App. Div. 1989). However, Gilbert Spruance Co. v. Pennsylvania Manufacturers' Ass'n Insurance Co., 134 N.J. 96 (1993), effectively douses that pursuit by emphasizing that coverage issues are generally to be resolved on the basis of the location of the insured risk.

Thus, a New Jersey Court adjudicating the issues in controversy in this case would be required, under the principles of Gilbert Spruance, to address questions of Michigan and Canadian law because at least two of the insured risks in controversy are located in those jurisdictions.

Under those circumstances, the limited nature of the contacts with New Jersey serves more properly to assess the second prong of the jurisdictional test -- whether to entertain jurisdiction would offend traditional notions of fair play and substantial justice. That determination requires an evaluation of such factors as "the burden on the defendant, the interests of the forum State, * * * the plaintiff's interest in obtaining relief[,] * * * 'the interstate judicial system's interest in obtaining the most efficient resolution of controversies; and the shared interest of the several States in further fundamental substantive social policies.'" Asahi Metal Indus. Co. v. Superior Court of Cal., 480 U.S. 102, 113, 107 S. Ct. 1026, 1034, 94 L. Ed. 2d 92, 105 (1987) (quoting World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 292, 100 S. Ct., 559, 562, 62 L. Ed. 2d 490, 498 (1980)).

In this case, what renders jurisdiction unreasonable is the limited interest of New Jersey as the forum state in resolving these controversies. The fact that New Jersey courts would have to decide foreign law, balanced against the shared interests of involved territories pursuing their substantive social policies, illustrates that point. The environmental concerns of the other jurisdictions make adjudication in those territories more desirable. See Gilbert Spruance, supra, 134 N.J. at 98. Those jurisdictions have the "dominant significant relationship" to the insured risk. Id. at 112. Therefore, New Jersey does not have jurisdiction over defendants.

SUPREME COURT OF NEW JERSEY

No. A-9/10 SEPTEMBER TERM 1993

ON APPEAL FROM Appellate Division, Superior Court

ON CERTIFICATION TO

WASTE MANAGEMENT, INC., etc., et al.,

Plaintiffs-Respondents,

v.

THE ADMIRAL INSURANCE COMPANY, et al.,

Defendants,

and

AUTO-OWNERS INSURANCE COMPANY, et al.,

Defendants-Appellants.

DECIDED October 13, 1994

PRESIDING Chief. Justice Wilentz

OPINION BY Justice Clifford

CONCURRING OPINION BY Justice O'Hern

Supreme Court, U.S.
FILED
DEC 29 1994
OFFICE OF THE CLERK

(2)

NO. 94-987

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1994

WMX TECHNOLOGIES, INC., WMI
WASTE MANAGEMENT OF CANADA, INC.,
WASTE MANAGEMENT OF MICHIGAN, INC.,
Petitioners,

v.

CANADIAN GENERAL INSURANCE COMPANY, COMMERCIAL UNION ASSURANCE COMPANY OF CANADA, ROYAL INSURANCE COMPANY OF CANADA, WELLINGTON INSURANCE COMPANY, and AUTO-OWNERS INSURANCE COMPANY,
Respondents.

BRIEF OF RESPONDENT AUTO-OWNERS INSURANCE COMPANY IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE NEW JERSEY SUPREME COURT

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19 pp

COUNTER-STATEMENT OF QUESTION PRESENTED:

Whether the Supreme Court of New Jersey correctly determined that New Jersey did not have personal jurisdiction over a Michigan insurer with no minimum contacts with New Jersey, regarding a dispute with Michigan insureds as to insurance coverage for claims relating solely to Michigan landfills, and with no contractual provisions of the insurance policy implicating an appreciable interest of the State of New Jersey?

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STATEMENT OF FACTS

Respondent Auto-Owners Insurance Company[1] was a party to an appeal before the New Jersey Supreme Court (Docket No. 36,304) that was consolidated with the appeal of four Canadian insurers. (Docket No. 36,331). Petitioners have filed a Petition for Writ of Certiorari to the New Jersey Supreme Court. This brief is submitted by Auto-Owners in opposition.

The factual background of this case that has been presented to the Court by petitioners is incomplete. Auto-Owners Insurance Company is a Michigan insurer located in Lansing, Michigan. It is not licensed to do business and does not issue policies to New Jersey insureds. The policies sued on in New Jersey were issued in Michigan to Michigan waste disposal businesses.

At the time suit was filed in New Jersey, Waste Management of Michigan, Inc., the successor of three of Auto-Owners' insureds, was named as one of the plaintiffs. The common factual features of those insureds are that each was a waste hauler with potential responsibility for costs of cleanup of three Michigan landfills. One of the landfills was in Grand Rapids, Michigan. Another was in Kalamazoo, Michigan. The third was in Metamora, Michigan. None were in New Jersey.

Thus, the dispute with Auto Owners brought to New Jersey involved Michigan insureds, a Michigan insurer, a Michigan insurance contract, legal liability arising out of Michigan landfills, and most importantly, no issue

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[1] Auto-Owners has no parent company and only wholly-owned subsidiaries. Thus there are no other corporate entities listed pursuant to Rule 29.1.

whatsoever with regard to whether the "territory of coverage" clause provides or does not provide insurance coverage for a claim. Indeed, there is no factual claim that the "territory of coverage" clause is germane to this litigation in providing petitioners with coverage, nor does Auto-Owners claim that the territory of coverage clause divests the petitioners of insurance coverage.

Thus, the ultimate issue is precisely this: Whether an inchoate contractual provision, standing alone, provides a basis for personal jurisdiction? The New Jersey Supreme Court determined that it did not, because of the absence of any forum related event that pertains to the respondents.

The structure of this litigation bears some comment. There are two categories of insurance policies involved. One group of insurers insured a parent corporation, Waste Management, Inc., now known as WMX Technologies, Inc., for all of its operations and subsidiaries. Another group of insurers, including Auto-Owners, insured local waste disposal companies acquired by subsidiaries of Waste Management. One of those subsidiaries is Waste Management of Michigan, Inc. It acquired Industrial Waste Disposal of Kalamazoo, Michigan, and Gateway Sanitation Service of Almont, Michigan, and other Michigan waste haulers. Typically, after acquisition, policies that had been issued by Auto-Owners were canceled and coverages were placed under the insurance program policies of Waste Management.

In this litigation, not all of the parties who were previously insureds under the policies of Auto-Owners have been made parties to the litigation as plaintiffs. Nor have tort claimants or claimants asserting rights of contribution been added to this litigation. As a result, this litigation is not a comprehensive suit that would determine the rights and

obligations of all responsible parties at the landfills at issue, nor determine the rights and obligations of claimants. In the event Auto-Owners were to prevail on coverage by litigating in New Jersey, it would not have a judgment that would be binding on claimants in Michigan.[2]

Contrary to the suggestion of petitioners, this case is not being litigated as a "mass" case with a single controlling factual issue common to all parties. The New Jersey litigation has been fractionalized in two ways. One is with respect to lost policy discovery, which has involved Auto-Owners and is ongoing. The other fractionalization of the case is in terms of the landfill sites. The case has been severed into individual landfill sites, as if each were a separate suit. Twenty of the approximately 100 landfills at issue have been identified for "Phase I" discovery and trial. None of those twenty involve Auto-Owners or its insureds.[3]

Thus, while there might be state-by-state common questions of law, questions of fact are on a landfill-by-landfill basis, without predominating common questions of

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[2] *Allstate Ins. Co. v. Hayes*, 442 Mich. 56, 67 n. 11; 499 N.W.2d 743, 748 n. 11 (1993) ("Thus, if the insurer wishes to obtain a judgment that would bind the alleged tort victim, the insurer must make the victim a party to the action for declaratory judgment").

[3] However, under the first case management order, Auto-Owners was enjoined from litigating with Waste Management or its subsidiaries, whether or not they were parties to the present suit, with one exception. The suit that had been pending in Michigan at the time the New Jersey action was started, involving a Grand Rapids site, has proceeded to resolution. However, petitioners recently moved in the New Jersey trial court for leave to amend plaintiffs' complaint, to add a fourth landfill in Evart, Michigan that would involve Auto-Owners' interests. The Evart, Michigan landfill also would not be involved in "Phase I" of this litigation. Nor does it raise a forum-related event.

fact. Of most significance to this appeal, there is no question of fact or law common to Auto-Owners and a New Jersey plaintiff, insured, or landfill.

The New Jersey Supreme Court opinion is accurate in reciting the absence of a New Jersey forum related event (Petitioners Appendix, p 64-A) or any minimum contact of Auto-Owners with New Jersey. Auto-Owners submits that this case does not present a meritorious case for granting certiorari.

LEGAL ARGUMENTS

POINT I: PETITIONERS COULD NOT PREVAIL ON THE MERITS OF THE APPEAL UNDER THE PROPOSED "INTEREST NEXUS" TEST BECAUSE NEW JERSEY HAS NO INTEREST IN THE AUTO-OWNERS CONTRACTS.

The most important question is this: even assuming for a moment validity of petitioners' extreme "interest nexus" argument founded on *Ashley v. Abbott Laboratories*, 789 F. Supp. 552 (E.D. N.Y., 1992), is there a significant New Jersey interest in the Auto-Owners contracts? No New Jersey plaintiff is seeking recovery against an Auto-Owners' insured. No New Jersey plaintiff is seeking insurance coverage from Auto-Owners. No New Jersey landfill involves Auto-Owners. This is stressed to point out that petitioners' position goes beyond "territory nexus" or "interest nexus" to the "no nexus" realm.

Unless this Court is prepared to go so far as to rule that a state with no interest may assert personal jurisdiction, merely because of business convenience of a corporate

conglomerate, plaintiffs cannot prevail on this appeal. This is not a mass tort case. It is not a comprehensive case. It is an amalgamation of disparate cases having the same subject matter generally but not the same facts nor the same law to be applied.[4] Nor is this an area of law where there is no applicable substantive law to be applied,[5] but for New Jersey, to provide relief for New Jersey plaintiffs.

This case has these and other factual distinctions from the main case relied on by the petitioners, *Ashley v. Abbott Laboratories*, 789 F. Supp. 552 (E.D. N.Y., 1992). However, petitioners ignore the fact that if this Court were to replace a territory nexus test for minimum contacts with an interest nexus test, under *Ashley*, there would still have to be an interest of the State of New Jersey:

> "The Court must first determine if the forum state has an appreciable interest in the litigation, i.e., whether the litigation raises issues whose resolution would be affected by, or have a probable impact on the vindication

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[4] The concurring opinion of the New Jersey Supreme Court points out that any assumption that New Jersey law might apply to non-New Jersey landfills is ruled out by a decision of the New Jersey Supreme Court rendered after the filing of this suit. See Petitioners' Appendix, p. 79A, citing, *Gilbert Spruance Co. v. Pennsylvania Manufacturers' Ass'n. Ins. Co.*, 134 N.J. 96, 629 A.2d 885 (1993). *Accord, Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 822, 105 S. Ct. 2965, 86 L. Ed.2d 688 (1985).

[5] See, e.g., *Ray v. Liberty Mutual Insurance Company*, 974 F.2d 754, 768-769 (6th Cir., 1992) (no insurance coverage for a generator of waste disposed of at the Metamora, Michigan landfill in light of the Michigan Supreme Court's construction of standard pollution exclusion in an insurance policy).

> of, policies expressed in the substantive, procedural or remedial laws of the forum. If there is an appreciable state interest, the assertion of jurisdiction is *prima facie* constitutional." 789 F. Supp. at 587.

What is New Jersey's interest in the contracts with Auto-Owners? Assume for a moment petitioners' worst-case scenario, implicit in petitioners' argument, that a Michigan judge would make an incorrect (inconsistent with New Jersey, thus to petitioners incorrect) ruling interpreting a Michigan contract between a Michigan insured and a Michigan insurer determining the rights of insurance with respect to a Michigan landfill. Or, assume the other argument in the petitioners' farragoes, that because they purchased a Michigan business holding a Michigan contract with a Michigan insurer, that petitioners are subjected to the "inefficiency" of having to litigate in Michigan where the witnesses and evidence are located. There is still no New Jersey state interest at stake, let alone the "appreciable state interest" required by *Ashley v. Abbott*. In short, petitioners' case is not meritorious under the most favorable lower court precedent they cite.

POINT II: CONTROLLING PRECEDENT FROM THIS COURT RULES OUT MERIT TO PETITIONERS' POSITION.

This Court has already addressed the question of whether a contract provision, standing alone, is sufficient to confer personal jurisdiction. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 478; 105 S. Ct. 2174; 85 L. Ed. 2d

528 (1985): "If the question is whether an individual's contract with an out-of-state party alone can automatically establish sufficient minimum contacts in the other party's home forum, we believe the answer clearly is that it cannot."

That question in *Burger King* is exactly this case. The "territory of coverage clause" is not germane to any issue in litigation in New Jersey. It is raised solely for personal jurisdiction reasons. But this Court emphasized in *Burger King* that a contract has to have a "substantial" connection to the forum state, 471 U.S. at 479. The territory clause which is not at issue for insurance coverage presents no substantial connection. It must be viewed, in the words of this Court, as a "random", "fortuitous", or "attenuated" connection that will not suffice for personal jurisdiction. Id.

Indeed, the threshold requirements for specific jurisdiction cannot be satisfied by an inchoate contractual provision, because not only must a defendant purposefully direct activities at residents of the forum for such jurisdiction to exist, but in addition, the forum litigation must arise out of or relate to those activities. *Burger King, supra*, 471 U.S. at 472. The central error of Waste Management is in ignoring the fact that the territory clause can never satisfy the second requirement, litigation arising from forum activities, where no accident occurred in the forum state.

Certainly *Burger King* is not a conceptual island. This Court has long held that personal jurisdiction cannot rest on non-germane matters. Even before *Burger King*, in *Rush v. Savchuk*, 444 U.S. 320, 329-330; 100 S. Ct. 571; 62 L. Ed. 2d 516 (1980), this Court had held that an insured could not be subjected to personal jurisdiction based upon an inchoate insurance contract providing coverage in a forum state. The *Rush* holding is fully consistent with the later holding in

Burger King. In *Rush*, it was pointed out: "In fact, the fictitious presence of the insurer's obligation in Minnesota does not, without more, provide a basis for concluding that there is any contact in the *International Shoe* sense between Minnesota and the insured".[6]

Additionally, *Burger King* is conceptually consistent with *Helicopteros Nacionales De Colombia, S.A. v. Hall*, 466 U.S. 417, 418; 104 S. Ct. 1868; 80 L. Ed. 2d 404 (1984) ("We hold that mere purchases, even if occurring at regular intervals, are not enough to warrant a state's assertion of *in personam* jurisdiction over a non-resident corporation in a cause of action not related to those purchase transactions"), (emphasis added), and, *Shaffer v. Heitner*, 433 U.S. 186, 97 S. Ct. 2569, 53 L. Ed. 2d 683 (1977) (even a corporate charter in Delaware is insufficient contact for personal jurisdiction in a non-Delaware cause of action).

Thus, petitioners' position lacks merit because personal jurisdiction cannot stand solely on a contractual matter that is not germane to events in the forum giving rise to the litigation. To rule in petitioners' favor, this Court would need to go to such lengths as to essentially eliminate personal jurisdiction as an issue. An insurance contract is not the only common example of inchoate rights in other states. Most people in our society have inchoate contractual rights to services in other states, even if they never exercise

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[6] While *Rush* involved personal jurisdiction of an insured, both an insured and an insurer are parties to the same contract. See also, *Sparkowich v. American Steamship Owners' Mutual Protection and Indemnity Ass'n., Inc.*, 687 F. Supp. 695, 698 (D. Me., 1988)("the language of *Rush* v. *Savchuk, supra*, establishes conclusively that, without more, an insurance obligation cannot be considered a jurisdictionally significant contact.")

those contractual rights. With a telephone comes a contractural right to place a call anywhere in the country. An automobile purchase carries with it a warranty contract for repairs at dealers across the country. A Visa card is advertised heavily as accepted all over the world.

Respectfully, to rule in petitioners' favor would require obliterating the cornerstones of personal jurisdiction law and dismantling the framework for state court limitations under due process.

POINT III: PETITIONERS' CERTIORARI PETITION EXAGGERATES THE EXTENT OF CONFLICT IN LOWER COURT DECISIONS.

There is no conflict in state and federal court decisions with respect to whether personal jurisdiction can be exercised based upon a territory of coverage clause in an insurance policy, in the absence of a forum accident. Petitioners are mis-citing cases with the distinguishable fact situation of a forum state accident (which then makes the territory of coverage clause germane to the litigation in the forum).

For example, in the Ninth Circuit, personal jurisdiction has been sustained where there has been an accident in the forum but not where there has been no forum state accident. Compare *Farmers Insurance Exchange v. Portage LaPrarie Ins. Co.*, 907 F.2d 911, 914 (9th Cir., 1990) ("Here, the forum was the site of the accident"), with, *Davis v. American Family Mutual Insurance Co.*, 861 F.2d 1159 (9th Cir., 1988) (Montana court did not have personal jurisdiction over out-of-state insurer for accident in the state of North Dakota), and *Hunt v. Erie Insurance Group*, 728

F.2d 1244 (9th Cir., 1984)[7] (California court did not have personal jurisdiction over east coast insurer for injuries sustained in Colorado accident). But cf., *Payne v. Motorist Mutual Insurance Company*, 4 F.3d 452 (6th Cir., 1993) (Where accident occurred in Tennessee, Tennessee court could exercise personal jurisdiction over Ohio insurer); *Rossman v. State Farm Mutual Automobile Insurance Co.*, 832 F.2d 282, 287 (4th Cir., 1987) (Virginia court could exercise personal jurisdiction over insurer for Virginia accident); *Puerto Rico v. SS Zoe Colocotroni*, 628 F.2d 652 (1st Cir., 1980) (Where the accident was in Puerto Rico waters, Puerto Rico court could exercise personal jurisdiction over insurer). These cases are readily reconcilable, and they turn on the factual distinction of the presence or absence of a forum state accident.

Other similar cases reflecting this factual distinction, and consistently finding due process does not permit the exercise of jurisdiction over an out-of-state insurer in the absence of a forum state accident are *Rambo v. American Southern Insurance Co.*, 839 F.2d 1415, 1419-20 (10th Cir., 1988) (Distinguishing cases where insurer has solicited business in forum or accident occurred in forum), and *Travelers Indemnity Co. v. Calvert Fire Insurance Co.*, 798 F.2d 826 (5th Cir., 1986), on rehearing in part, 836 F.2d 850

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[7] In *Hunt*, the Ninth Circuit also rejected the circular argument now made by Waste Management that the territory clause itself is injection into the forum. 725 F.2d at 1246-1247. *Hunt* held the territory clause could not "fairly be characterized as an act by which Erie (the insurer) had purposefully availed itself of the privilege of conducting activities in California", where the accident did not occur in California. The plaintiff's unilateral decision to move to California after the accident (analogous to Waste Management's subsidiaries acquiring Auto-Owners' named insureds, all Michigan entities, after issuance of the policies) was held to be an insufficient basis to say that the insurer had purposefully availed itself of the forum state's laws and protections.

(5th Cir., 1988). As in *Hunt*, the *Travelers* court emphasized that the accident did not occur in the forum and distinguished other cases finding personal jurisdiction on that basis:

> "[T]hese cases are properly distinguishable. Of most significance, each involves a suit based on an accident occurring within the forum jurisdiction, an important factor tending to support specific jurisdiction." 798 F.2d at 833.

The actual split of authority that exists is not directly related to this case. There are two decisions of state supreme courts that suggest personal jurisdiction would not exist over an out-of-state insurer even if there was an accident within the forum. One of those is *Batton v. Tennessee Farmers Mutual Insurance Co.*, 153 Ariz. 268; 736 P.2d 2 (1987). The other in *Meyer v. Auto Club Insurance Association*, 492 So.2d 1314 (Fla., 1986). Both involved an accident that occurred in the forum, but, with no liability claim of a forum resident.[8] Thus they are distinguishable and are not directly on point.

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[8] Additionally, there is one decision of the Wisconsin intermediate appellate court to the same effect. See *Marsh v. Farm Bureau Mutual Ins. Co.*, 179 Wis.2d 42, 505 N.W.2d 162 (1993), holding that Wisconsin did not have personal jurisdiction of a suit by a Minnesota resident against an Iowa insurer. However, on reading this case cited by Petitioners, it is apparent that it is of limited importance. While there had been an accident in Wisconsin, the insurer had denied coverage and a defense because of late notice. The second suit was not by the Wisconsin resident involved in the Wisconsin accident, but rather was by the Minnesota resident, the insured, against the Iowa insurer. Thus it was a suit on the contract, only secondarily related to the auto accident, and the Wisconsin court found no personal jurisdiction.

It is respectfully submitted that certiorari is not merited to overrule isolated decisions that are distinguishable anyway, even if not in keeping with the otherwise consistent court decisions that turn on whether there is a forum state accident. The New Jersey Supreme Court decision is consistent with all of the other federal court decisions.

POINT IV: THE OTHER SUGGESTED REASONS FOR CERTIORARI ARE ALSO LACKING IN MERIT.

One other suggested ground for certiorari being granted is to "resolve confusion", assertedly as to whether personal jurisdiction is a personal liberty interest or a sovereignty interest. This relatively minor debate was reconciled previously by this Court's decision in *Insurance Corp. of Ireland, Ltd v. Compagnie Des Bauxites De Guinea*, 456 U.S. 694, 702 n. 10; 102 S. Ct. 2099; 72 L. Ed. 2d 492 (1982), explaining that "the restriction on state sovereign power described in *World Wide Volkswagen*. . .must be seen as ultimately a function of the individual liberty interest preserved by the due process clause". *Accord, Burger King, supra*, 471 U.S. at 472 n. 13.

At various points in the Petition, it is suggested that the territory clause is a contractual agreement to submit to jurisdiction. This is a weak claim for two reasons. First, the territory clause does not so state, and it would have to be tortured to yield a confession of such meaning. Secondly, the argument is self-defeating for federal question purposes: if it is a contractual agreement of the parties, no federal constitutional issue exists. Obviously, the New Jersey Supreme Court implicitly found no such contractual agreement.

Finally, an indication of whether certiorari should be granted can be gleaned from *General Council on Finance*

and Administration of the United Methodist Church v. Superior Court of California, 439 U.S. 1369; 99 S. Ct. 35; 58 L. Ed. 2d 63 (1978). In *General Council*, Justice Rehnquist, as Circuit Justice, denied a stay pending an application for certiorari. The basis for doing so was, "there is no indication that [the California lower court] failed to apply the due process standards enunciated in *International Shoe*, and cases which have followed it, to the circumstances presented, and, therefore, I believe it unlikely that this issue would command the votes necessary for certiorari". 439 U.S. at 1374.

Here, the New Jersey Supreme Court has faithfully followed the precedent from the United States Supreme Court on personal jurisdiction. Six of the seven justices from the New Jersey Supreme Court have agreed that in the absence of a forum related event personal jurisdiction cannot rest on the territory of coverage clause, perfectly consistent with *Burger King, supra*, that a contractual provision cannot alone be the basis of personal jurisdiction. A seventh justice concurred, finding that the exercise of personal jurisdiction over respondents would offend traditional notions of fair play and substantial justice. Certainly there has been no failure to adhere to precedent from the United States Supreme Court. In short, this is not a case that merits certiorari, under *General Council, supra.*

CONCLUSION AND RELIEF REQUESTED

The Petition for Writ of Certiorari should be denied. Petitioners cannot win on the most extreme theory advanced because New Jersey lacks an appreciable interest in the Auto-Owners contracts. The asserted split of authority has been exaggerated. The decision of the New Jersey Supreme Court correctly determined that no appellate court has sustained personal jurisdiction in the absence of a forum related event.

Respondent Auto-Owners Insurance Company requests that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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NO. 94-987

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1994

WMX TECHNOLOGIES, INC., WMI WASTE MANAGEMENT OF CANADA, INC., WASTE MANAGEMENT OF MICHIGAN, INC.,

Petitioners,

v.

CANADIAN GENERAL INSURANCE COMPANY, COMMERCIAL UNION ASSURANCE COMPANY OF CANADA, ROYAL INSURANCE COMPANY OF CANADA, WELLINGTON INSURANCE COMPANY, AND AUTO-OWNERS INSURANCE COMPANY,

Respondents.

On Petition For a Writ of Certiorari to the New Jersey Supreme Court

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BEST AVAILABLE COPY

COUNTER-STATEMENT OF QUESTION PRESENTED:

Whether the New Jersey Supreme Court properly dismissed four Canadian insurers from a New Jersey declaratory proceeding on the basis of lack of in personam jurisdiction when there was no factual connection between the insurers and the State of New Jersey and the subject matter of the New Jersey declaratory claims against those insurers had no factual connection with New Jersey.

RULE 29.1 LISTING

Pursuant to Rule 29.1, the following is a list of all parent companies and subsidiaries (except wholly owned subsidiaries) of the following Respondents: respondent Canadian General Insurance Company: Canadian Insurance Shares Limited, Traders General Insurance Company, Scottish & York Insurance Co. Limited, Victoria Insurance Company of Canada, Central Canada Insurance Service Limited, Trade-Line Restoration Inc., and Provinco Financing Canada Limited; respondent Commercial Union Assurance Company of Canada: Commercial Union of Canada Holdings Ltd.; respondent Royal Insurance Company of Canada: Royal Insurance plc.; and respondent Wellington Insurance Company: The London Insurance Group.

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COUNTER-STATEMENT OF THE CASE

I. The Factual Circumstances of the Parties and the Claim Asserted Against Waste Management of Canada

Respondents Canadian General Insurance Company, Commercial Union Assurance Company of Canada, Royal Insurance Company of Canada and Wellington Insurance Company (hereinafter collectively "the Canadian Insurers") are Canadian insurance companies doing business in Canada. The Canadian Insurers conduct no business in the United States and have no assets or property of any kind located in the United States. They are not licensed to insure risks or otherwise do business in the United States and maintain no telephone listing or bank accounts here. The Canadian Insurers have no employees or agents in the State of New Jersey and do not advertise, solicit or sell insurance in New Jersey.

Petitioner WMI Waste Management of Canada (hereinafter "WM of Canada")[1] is a Canadian company that is not licensed to do business in the State of New Jersey. WM of Canada is the only plaintiff in this action seeking coverage against the Canadian Insurers. WM of Canada, including several subsidiaries and predecessor entities, purchased the policies allegedly issued by the Canadian

[1] The alleged insurance policies issued by Canadian General Insurance Company, Commercial Union Assurance Company of Canada and Royal Insurance Company of Canada provide coverage to WM of Canada or one of its subsidiaries or predecessor companies. Some of the Fireman's Fund of Canada (Wellington) policies also name Waste Management, Inc. (now known as WMX Technologies, Inc.), as an "additional named insured." This was a routine industry practice intended to provide WMX Technologies with certain limited coverage only with respect to the liability arising out of the operations of York Sanitation.

Insurers that are the subject of this action through Canadian insurance brokers for WM of Canada's operations (disposal sites, plants or garages) located in Canada. The Canadian insurance policies at issue make no reference to offices of a policyholder anywhere in the United States; to the contrary, the Canadian Insurers issued their respective policies only after ascertaining that WM of Canada or its predecessor entities conducted operations solely in Canada. In addition, the policies were purchased with Canadian dollars. The policies were signed, issued and delivered exclusively in Canada between the Canadian Insurers and WM of Canada or its predecessor companies.

WM of Canada brought this declaratory-judgment action against the Canadian Insurers to obtain insurance coverage for WM of Canada's potential liability in a Canadian lawsuit entitled Gullo Enterprises, Ltd. v. WMI Waste Management of Canada, Inc., pending in the Supreme Court of Ontario. In this Canadian suit, WM of Canada is claimed to have contaminated adjacent property through the operation of a landfill it owns in Ontario. WM of Canada is the only defendant in the Canadian suit.

II. The Trial Court Opinion

WM of Canada petitions this Court to adopt the reasoning of the trial court opinion denying the Canadian Insurers' motion to dismiss for lack of jurisdiction. The trial court concluded that a "territory of coverage" clause found in the policies of each of the Canadian Insurers, in and of itself, was a sufficient basis on which to find in personam jurisdiction over the Canadian Insurers. The trial court also found that New Jersey has an "interest nexus" in resolving large insurance cases sufficient to confer personal jurisdiction over the Canadian Insurers despite the lack of any factual ties to New Jersey, i.e., absent minimum contacts.

III. The Decision Of The New Jersey Supreme Court

On interlocutory appeal the New Jersey Supreme Court, in a unanimous decision, reversed the trial court. The New Jersey Supreme Court began its analysis by recounting the absence of any contact between the Canadian Insurers, WM of Canada, and New Jersey. After restating fundamental propositions of in personam jurisdiction, including relevant due-process considerations, the New Jersey Supreme Court ruled that the Canadian Insurers had no contacts with New Jersey other than the "territory of coverage" clause contained in the insurance policies of the Canadian Insurers. The New Jersey Supreme Court concluded:

> We hold that in the absence of a forum-related event, a "territory of coverage" clause alone does not create a sufficient basis on which to rest jurisdiction in this state. See, e.g., Farmers Ins. Exch. v. Portage La Prairie Mut. Ins. Co., 907 F.2d 911, 913-4 (9th Cir. 1990); Rossman v. State Farm Mut. Auto Ins. Co., 832 F.2d 282, 286 (4th Cir. 1987); Commonwealth of Puerto Rico v. The SS Zoe Colocotroni, 628 F.2d 652, 668 (1st Cir. 1980); Batton v. Tennessee Farmers Mut. Ins. Co., 736 P.2d 2, 6 (Ariz. 1987); Meyer v. Auto Club Ins. Ass'n, 492 So.2d 1314, 1316 (Fla. 1986); Guardian Royal Exch.

Assurance v. English China Clays, P.L.C., 815 S.W. 2d 223, 227 (Tex. 1991).

Waste Management Inc. v. Admiral Ins. Co., 138 N.J. 106, 127, 649 A.2d 379, 389 (N.J. 1994).

While recognizing the trend to expand the scope of jurisdiction over non-residents and the special interest that a state may have in the field of insurance, the New Jersey Supreme Court held that neither of these circumstances justified eliminating the minimal due process requirement that the defendant create minimum contacts with New Jersey by purposely availing itself of some benefit of doing business in the state. It concluded that "[b]ecause no contacts exist between New Jersey and the Canadian Insurers, these defendants cannot be made subject to this State's personal jurisdiction." Id.

The New Jersey Supreme Court concluded its analysis by briefly addressing the trial court's alternative holding based on New Jersey's "interest nexus." The trial court's attempt to support its opinion by reference to the decision of Ashley v. Abbott Laboratories, 789 F. Supp. 552 (E.D.N.Y. 1992) was found to be misplaced because of distinguishable facts and, most significantly, because the novel jurisdictional tests crafted in the Ashley decision rested largely on the existence of a uniform, mass tort which would have gone unredressed without modification of conventional jurisdictional principles.

Finally, the New Jersey Supreme Court rejected the trial court's reference to New Jersey's asserted interest in hosting this foreign insurance dispute on the basis that it would avoid "fractionalization" of this massive declaratory action. The New Jersey Supreme Court found that due-process analysis focuses "principally on substantial justice

and fundamental fairness, not on economy and convenience." Waste Management Inc. v. Admiral Ins. Co., 138 N.J. at 131, 649 A.2d at 391.

REASONS FOR DENYING THE WRIT

POINT I: THE INSURANCE CONTRACTS AT ISSUE IN THIS ACTION ARE INSUFFICIENT MINIMUM CONTACTS UNDER BURGER KING

Petitioners recognize that the contacts, if any, that do exist between New Jersey and the Canadian Insurers arise out of a contractual relationship. ("Respondents' promises to perform insurance services in New Jersey constitute. . . minimum contacts with New Jersey. . . ."). Petition for a Writ of Certiorari to the New Jersey Supreme Court ("Pet. Cert.") at 14. Petitioners' argument does not, however, include an analysis of a territory of coverage clause in terms of this Court's precedents to determine whether such a clause could give rise to a jurisdictionally significant contact.

Clearly it could not. The New Jersey Supreme Court's holding that "a 'territory of coverage' clause alone does not create a sufficient basis on which to rest jurisdiction in this state," 138 N.J. at 127, 649 A.2d at 389, accords with this Court's position that: "If the question is whether an individual's contract with an out-of-state party alone can automatically establish sufficient minimum contacts in the other party's home forum, we believe the answer clearly is that it cannot." Burger King Corp. v. Rudzewicz, 471 U.S. 462, 478, 105 S.Ct. 2174, 2185 (1985)(original emphasis).

If a contract entered into with a forum resident, without more, is an insufficient jurisdictional predicate, then a contract, without more, entered into with a non-resident of the forum is still less adequate. The insurance contracts at issue are between the Canadian Insurers and Canadian insureds.

It is the negotiations, the contemplated future consequences of the contract and the parties' course of dealing that determine whether a contracting party sufficiently availed itself of a forum so as to require a defense in that forum. Burger King, 471 U.S. at 479, 105 S.Ct. at 2185. The Canadian Insurers entered into insurance contracts with an Ontario resident; neither the negotiations nor the parties' subsequent course of dealing touched upon New Jersey in any manner. As a Canadian land-fill operation with no known operations outside of Canada, the contemplated future consequences of the contract in New Jersey -- if any -- would have been so attenuated as to have been insignificant for jurisdictional purposes. See World Wide Volkswagen v. Woodson, 444 U.S. 286, 299, 100 S.Ct. 559, 568 (1980).

Petitioners place considerable reliance on the argument that the commercial benefit flowing from a nationwide territory of coverage clause creates a basis for nationwide jurisdiction. Pet. Cert. at 14. The same logic was rejected in World Wide Volkswagen, 444 U.S. at 289, 105 S.Ct. at 563. The plaintiff there argued that Oklahoma jurisdiction over a New York Volkswagen dealer could be founded on the chain of Volkswagen service centers located throughout the United States. Those centers comprised, according to the plaintiff, a commercial benefit sufficient to indicate the dealer's purposeful availment of the forum. Id.

A nationwide chain of service centers is closely analagous to the "nationwide promise of insurance services" posited by Petitioners as a contact created by a territory of coverage clause. In World Wide Volkswagen, this Court rejected a contact of this nature as too attenuated to support a finding of jurisdiction, a holding which should govern here. Id.

A. There Is No "Split" Of Authority On The Issue That A Territory Of Coverage Clause Alone Is Not A Basis For Jurisdiction

Petitioners' principal argument for a grant of certiorari is premised on a fictional "split between federal circuit courts and state supreme courts." Pet. Cert. at 13. This fictional split of authority is manufactured by artful selection among decisions that consider in a variety of circumstances whether a territory of coverage clause provides a basis for personal jurisdiction. Petitioners claim that a so-called territory of coverage rule "has been accepted" by the majority of federal courts. Pet. Cert. at 11.[2] In purported contrast, State courts "have rejected the exercise of personal jurisdiction on the basis of territory of coverage clauses." Pet. Cert. at 12.[3]

The cited decisions do not, in fact, even address the issue in the present case. The New Jersey Supreme Court framed the issue at hand when describing the trial court "as the only court in this or any other jurisdiction to declare that a territory of coverage clause in an insurance policy, standing alone, confers jurisdiction over an alien insurer." Waste Management Inc. v. Admiral Ins. Co., 138 N.J. at 116, 649 A.2d at 384 (emphasis added).

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[2]Petitioners cite Payne v. Motorists Mutual Ins. Co., 4 F.3d 452 (6th Cir. 1993); Farmers Ins. Co. v. La Prairie Mutual Ins. Co., 907 F.2d 911 (9th Cir. 1990); Rossman v. State Farm Automobile Ins. Co., 832 F.2d 282 (4th Cir. 1987); and Commonwealth of Puerto Rico v. The SS Zoe Colocotroni, 628 F.2d 652 (1st Cir. 1980).

[3]Petitioners cite Batton v. Tennessee Farmers Mutual Insurance Co., 736 P.2d 2 (Ariz. 1987); Meyer v. Auto Club Insurance Ass'n, 492 So.2d 1314 (Fla. 1986); and Marsh v. Farm Bureau Mutual Insurance Co., 505 N.W.2d 162 (Wis. App. 1993).

In every decision cited by Petitioners, there was, in addition to a territory of coverage clause, a significant forum contact by the insurer, typically an auto accident in the forum. That accident in turn gave rise to a coverage dispute between insured and insurer, in the same forum. The assertion of jurisdiction in many of these cases was founded on the fact that: 1) the insured-against event was foreseeable; 2) the insurer's actual provision of defense and indemnity in the forum demonstrated purposeful availment of the forum; and 3) the coverage dispute arose out of the forum contact, i.e. the insurer's provision of defense and indemnity in the forum. See Note 2, p. 7, supra.

Having looked to inapposite cases, Petitioners compound the confusion by structuring an argument on decisions that do not construe a consistent set of facts. A true judicial "split" is created when courts reach different legal results despite applying the same facts. Petitioners fail to present a true split, because the state and federal decisions which they compare are premised on different facts.

In the state decisions (See Note 3, p. 7, supra), the insured-against event occurred in the forum state, but the plaintiff-insured was not a resident of that state and the courts refused to assert personal jurisdiction over the insurer in the subsequent coverage dispute. By contrast, in three of the four federal cases cited by Petitioners, the insured-against event also occurred in the forum state, but the plaintiff was a resident of the forum, and the courts, therefore, found that an assertion of jurisdiction was proper. It is residency and its effect on the issue of purposeful availment that was dispositive in these cases.

Moreover, Petitioners' purported federal-state split in authority ignores the many federal cases in which jurisdiction

is declined absent a forum-related event[4] and the many state cases where a territory of coverage provision does serve as a basis for jurisdiction, in conjunction with a forum-related event.[5]

B. The New Jersey Supreme Court Rejected Consent as a Basis for Jurisdiction in this Instance

Finally, Petitioners' contention that the New Jersey Supreme Court did not address whether a territory of coverage clause amounted to constructive consent to jurisdiction is less than accurate. Pet. Cert. at 19. The New Jersey Supreme Court referred to actions that may constitute constructive consent, citing the same decisions as Petitioners cited. The Court then noted that, "however, not every act of a potential defendant is sufficient to satisfy the jurisdictional requirement of intentional availment." 138 N.J. at 127, 649 A.2d at 389. Even under the rubric of "consent", a territory of coverage provision was deemed to be too attenuated to serve as a basis for jurisdiction.

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[4]Davis v. American Family Mutual Ins. Co., 861 F.2d 1159 (9th Cir. 1988); Rambo v. American Southern Ins. Co., 839 F.2d 1415 (10th Cir. 1988); Travelers Indemnity Co. v. Calvert Fire Ins. Co., 798 F.2d 826 (5th Cir. 1986); Hunt v. Erie Ins. Group, 768 F.2d 1244 (9th Cir. 1984); Magnus Maritec Int'l, Inc. v. The SS Panteleimon, 444 F. Supp. 567 (S.D. Tex. 1978).

[5]Szalay v. Handcock, 819 S.W.2d 684 (Ark. 1991); Guardian Royal Exchange Assurance, Ltd. v. English China Clays P.L.C., 815 S.W.2d 223 (Tex. 1991); New Jersey Full Ins. Underwriting Assoc. v. Independent Ins. Co., 600 A.2d 1243 (N.J. Super. 1991).

POINT II: THERE IS NO CONFLICT BETWEEN THE NEW JERSEY SUPREME COURT'S DECISION AND THE ASHLEY DECISION

Contrary to Petitioners' suggestion, the Eastern District of New York's decision in Ashley v. Abbott Laboratories, 789 F. Supp. 552 (E.D.N.Y. 1992) ("Ashley") does not conflict with the New Jersey Supreme Court's decision in the present case with regard to the appropriate due process analysis for "complex, multi-party" litigation.

The "interest" based test in Ashley was premised on the existence of a uniform tort involving a uniform mechanism of injury. Id. at 557. In contrast, the instant case is an insurance declaratory judgment action in which each insurer's liability "will be governed by the specific terms of its own contracts of insurance." Waste Management Inc. v. Admiral Ins. Co., 138 N.J. at 130, 649 A.2d at 390.

Furthermore, Ashley's extraordinarily relaxed jurisdictional formulation was developed in response to the adoption of the "market share" theory of liability by the New York Court of Appeals in Hymowitz v. Eli Lilly & Co., 73 N.Y.2d 487, 541 N.Y.S.2d 941, 539 N.E.2d 1069, cert. denied, 493 U.S. 944, 110 S.Ct. 350 (1989). According to the "market share" theory, liability was assessed against DES manufacturers according to each manufacturer's share of the national market. In contrast to the present case, under the market share theory, a plaintiff's recovery would be frustrated if all manufacturers could not be brought into the same court. Id. Moreover, no forum outside New York embraced the "market share" theory of liability. "Other, perhaps even more appropriate forums" were not available to the plaintiffs in the Ashley case. Waste Management Inc. v. Admiral Ins. Co., 138 N.J. at 130, 649 A.2d at 390. The

most appropriate forum for the Canadian plaintiff in the present case is Canada, which is of course available.

Unlike New York in Ashley, New Jersey has no interest in the Canadian Insurers' contracts. No New Jersey plaintiff is seeking coverage from the Canadian Insurers. No New Jersey landfill is covered by the Canadian Insurers' contracts. New Jersey has no interest in the outcome of this action, which will determine whether a Canadian insured or a Canadian insurer must pay for the clean up of land located in Canada and owned by Canadians.

Moreover, as the New Jersey Supreme Court recognized, Ashley "was limited strictly to actions brought by New York plaintiffs for injuries occurring in New York." Id. The Ashley interest based test would not be available to a Canadian plaintiff suing in New Jersey for coverage of a Canadian site.

Finally, the Ashley court premised its rejection of the traditional "minimum contacts" analysis on the fact that the nonresident DES manufacturers participated in a national market from which they derived some benefit. Therefore, the defendants in the Ashley case could "reasonably expect" that the sale of DES in New York would have "some consequences" in that state. Id. at 570. See also Phillips Petroleum v. Shutts, 472 U.S. 797, 808, 105 S. Ct. 2965, 2972 (1985) (a state "should not be able to exert jurisdiction over the plaintiffs' claims unless the plaintiffs have sufficient minimum contacts" with that state). In contrast, the Canadian Insurers had no reason to foresee that a contract to insure a Canadian company for a Canadian site would require them to defend a suit in a New Jersey court.

POINT III: PETITIONERS' SUGGESTION THAT THIS COURT'S PERSONAL JURISDICTION HOLDINGS ARE CONFUSED AND REQUIRE CLARIFICATION LACKS MERIT

Petitioners' claim that there is confusion as to whether this Court's holdings in Burnham v. Superior Court, 495 U.S. 604, 110 S.Ct. 2105 (1990) and Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 102 S.Ct. 2099 (1982) are consistent and that these cases do not fully explain the balancing of personal liberty interests and sovereignty interests required when considering the assertion of personal jurisdiction. Petitioners fail to point to any court decision which shares this alleged confusion. The reason is that no real confusion exists.

The relatively minor debate to which Petitioners refer was resolved in Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee, supra, where this Court noted in a footnote that personal jurisdiction is a function, ultimately, of the liberty interest preserved by the Due Process Clause. 456 U.S. 702-03 n.10. If the sovereign power of a court were to control personal jurisdiction, it would not be possible to waive personal jurisdiction. Id.

The conflict seen by the treatise writers cited by Petitioners either predates this Court's personal jurisdiction decisions in Burger King Corp. v. Rudzewicz, 471 U.S. 462, 105 S.Ct. 2174, 85 L.Ed.2d 528 (1985), Asahi Metal Ind. Co. v. Superior Ct., 480 U.S. 102, 107 S.Ct. 1026, 94 L.Ed.2d 92 (1987) and Burnham v. Superior Court, or relates to cases involving products placed in the stream of commerce and have no applicability to the facts herein.

CONCLUSION AND RELIEF REQUESTED

The Petition for Writ of Certiorari should be denied. The New Jersey Supreme Court was correct in its

determination that the action against the Canadian Insurers should be dismissed since the Canadian Insurers and the Petitioners' claim against them have no connection with New Jersey.

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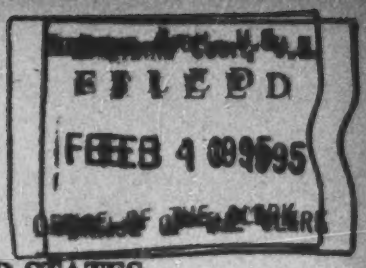

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1994

WMX TECHNOLOGIES, INC.
WMI WASTE MANAGEMENT OF CANADA, INC.
WASTE MANAGEMENT OF MICHIGAN, INC.

Petitioners,

v.

CANADIAN GENERAL INSURANCE COMPANY, COMMERCIAL UNION ASSURANCE COMPANY OF CANADA, ROYAL INSURANCE COMPANY OF CANADA, WELLINGTON WELLINGTON INSURANCE COMPANY, AND AUTO OWNERS INSURANCE COMPANY,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO
THE NEW JERSEY SUPREME COURT

PETITIONERS' REPLY MEMORANDUM

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I. The Conflict of Authority Regarding the Territory of Coverage Rule Necessitates Resolution By the Court.

Respondents[1] concede that a court has the power to exercise personal jurisdiction over any defendant that has "purposefully availed" itself of the benefits of the forum state. Hanson v. Denckla, 357 U.S. 235, 253, 78 S. Ct. 1228, 1240 (1958), citing International Shoe Co. v. Washington, 326 U.S. 310, 319, 66 S. Ct. 154, 159 (1945). Respondents contend, however, that there is no conflict among state and federal courts as to whether an express promise by an insurer to provide insurance services within the forum state (i.e. a territory of coverage provision) constitutes a "purposeful availment" of the benefits of the forum state and thus is a sufficient basis to permit the forum state to exercise jurisdictional power over the insurer.

Contrary to Respondents' assertions, there is a deeply divided split of authority among courts on this issue. In Farmers Insurance Exchange v. Portage La Prairie Mutual Insurance Co., 907 F.2d 911 (9th Cir. 1990) ["Farmers"], the Ninth Circuit held that a promise to provide insurance services in the forum state is purposeful availment:

> Portage's [the insurer's] territorial policy limit included Montana within its scope. Portage controlled its own amenability to suit. We therefore hold that Portage purposefully availed itself of the Montana forum when it contracted to indemnify and defend claims arising there.

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[1] The five Respondents are Canadian General Insurance Company, Commercial Union Assurance Company of Canada, Royal Insurance Company of Canada and Wellington Insurance Company (collectively, the "Canadian Respondents"), and Auto Owners Insurance Company ("Auto Owners").

In accordance with Rule 29.1, the parent companies or subsidiaries of Petitioners are identified in Petitioners' Writ of Certiorari ("Petitioners' Writ") at 2 n.2.

Id. at 914. The Sixth Circuit Court of Appeals came to the same conclusion in Payne v. Motorists' Mutual Insurance Cos., 4 F.3d 452 (6th Cir. 1993)["Payne"]:

> [The insurer] purposefully availed itself of the Tennessee forum by contractually providing explicit insurance coverage for any accidents in Tennessee. The fact that [the insurer] chose to provide coverage for all fifty states . . .constitutes purposeful availment of any individual state's forum.

Id. at 456. The view of Farmers and Payne is the majority view of the jurisdictional import of the territory of coverage provision. W. Hoffman, Personal Jurisdiction Over Alien Insurance Companies: The Territory-of-Coverage Rule, 26 Tort & Insur. L.J. 703, 704, 709 (1991) ("the majority of U.S. courts that have addressed the issue to date holds that the inclusion of the forum state in the territory of coverage of an insurance policy may support jurisdiction over an alien insurer" because "the insurer's act of insuring a risk that may be realized in the forum state satisfies the constitutional requirement of 'purposeful availment'").

In sharp contrast, the Court of Appeals of Wisconsin held that the inclusion of the forum state within the territory of coverage clause did not constitute purposeful availment with the forum state. Marsh v. Farm Bureau Mut. Ins. Co., 179 Wis. 2d 42, 505 N.W.2d 162, 167 (1993), rev. denied 510 N.W.2d 137 (Wis. Nov. 15, 1993) ["Marsh"] ("[t]he insurance contract does not evince a purposeful availment of the benefits of doing business in Wisconsin"). Similarly, the Supreme Court of Arizona rejected the exercise of in personam jurisdiction on the basis of an insurer's promise to provide insurance services in the forum state, reasoning as follows:

> Extension of nationwide coverage by an insurer may make lawsuits by insureds in foreign jurisdictions reasonably foreseeable, but state jurisdiction over foreign defendants is impermissible unless the defendant. . .has purposefully directed its activities at the forum state.

Batton v. Tennessee Farmers Mut. Ins. Co., 153 Ariz. 268, 272, 736 P.2d 2, 6 (1987) ["Batton"]; accord Meyer v. Auto Club Insur. Ass'n, 492 So. 2d 1314, 1315 (Fla. 1986) ("the respondent, having no contact with Florida, therefore, had no reasonable anticipation of being subjected to defending a suit in Florida courts").

Rather than acknowledging this conflict in the authorities, Respondents attempt to disguise it by focusing on contacts of policyholders or of third parties with the forum. According to the Canadian Respondents:

> In every decision cited by Petitioners, there was, in addition to a territory of coverage clause, a significant forum contact by the insurer, typically an auto accident in the forum. That accident in turn gave rise to a coverage dispute between the insured and insurer, in the same forum.

(Canadian Respondents' Opposition to Petitioners' Writ ("Canadian Respondents' Opposition") at 8 (emphasis added).)[2]

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[2] Respondent Auto Owners takes a similar position:

> There is no conflict in state and federal court decisions with respect to whether personal jurisdiction can be exercised based upon a territory of coverage clause in an insurance policy, in the absence of a forum accident.

(continued...)

The fallacy in Respondents' position is that an "accident" in the forum state is not a "significant forum contact" by the defendant insurer. It is a contact by the plaintiff policyholder. The "accident," in all cases, arose entirely from the activity of the policyholder or third parties, not from any activity of the insurer. Indeed, in each of the cited cases the insurer had done nothing in the forum other than (1) promise, in the territory of coverage provision in its insurance policy, to defend and indemnify claims in the forum and (2) appear in the forum to challenge jurisdiction over its person.

When the courts in Farmers, Payne, and the cases adopting the same rationale (see Petitioners' Writ at 11-12) ruled that the insurer's promise of coverage within the forum state was "purposeful availment," they could not have been relying on the fact of the policyholder's accident in the forum. It is fundamental hornbook law that the "unilateral activity of another party or a third person is not an appropriate consideration when determining whether a defendant has sufficient contacts with a forum State to justify an assertion of jurisdiction." Helicopteros Nacionales de Columbia, S.A. v. Hall, 466 U.S. 408, 417, 104 S. Ct. 1868, 1873 (1983) (emphasis added), citing Kulko v. California Superior Court, 436 U.S. 84, 93, 98 S. Ct 1690, 1697 (1978) and Hanson v. Denckla, 357 U.S. 235, 253, 78 S. Ct 1228, 1239 (1958).

Moreover, even the cases which did not uphold a court's power to exercise in personam jurisdiction based on the territory of coverage provision -- that is, the decisions which have adopted Respondents' position on the merits of this jurisdictional dispute -- have recognized that the occurrence of the policyholder's

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[2](...continued)
(Auto Owners' Opposition to Petitioners' Writ ("Auto Owners' Opposition") at 9 (emphasis in original).)

accident in the forum state is irrelevant in assessing a court's personal jurisdiction power over the insurer. Hunt v. Erie Ins. Group, 728 F.2d 1244 (9th Cir. 1994); Batton v. Tennessee Farmers Mut. Ins. Co., 153 Ariz. 268, 736 P.2d 2 (1987); Meyer v. Auto Club Ins. Ass'n, 492 So. 2d 1314 (Fla. 1986); Marsh v. Farm Bureau Mut. Ins. Co., 179 Wis. 2d 42, 505 N.W.2d 162 (1993), rev. denied, 510 N.W.2d 137 (Wis., Nov. 15, 1993).[3]

In short, the situs of the policyholder's accident within or without the forum state cannot harmonize the two conflicting lines of authority as to the jurisdictional import of the territory of coverage provision because the situs of the policyholder's activities is of no constitutional significance as to the forum state's jurisdictional power over the defendant insurer.

The Respondents next attempt to distinguish the cases adopting the territory of coverage rule by focusing on yet another factor constitutionally irrelevant to the issue of the forum state's power over the defendant -- the residency of the plaintiff. The Canadian Respondents thus state that "in three of the four federal cases cited by Petitioners, the insured against event also occurred in the forum state, but the plaintiff was a resident of the forum, and the courts, therefore, found that an assertion of jurisdiction was proper. It is residency and its effect on the issue of purposeful availment that was dispositive in these cases." (Canadian Respondents' Opposition at 8.)

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[3] Canadian Respondents also cite three cases in which a territory of coverage clause was not even at issue. Davis v. American Family Mut. Ins. Co., 861 F.2d 1159 (9th Cir. 1988); Rambo v. American Southern Ins. Co., 839 F.2d 1415 (10th Cir. 1988); Travelers Indemnity Co. v. Calvert Fire Ins. Co., 798 F.2d 826 (5th Cir. 1986); Magnus Maritec Int'l, Inc. v. The SS Panteleimon, 444 F. Supp. 567 (S.D. Tex. 1978).

Respondents miss the point: if defendant's contacts with the state are insufficient for the forum court to assert jurisdiction, the fact that the plaintiff is a forum resident cannot change the result. Keeton v. Hustler Magazine, Inc., 465 U.S. 770, 104 S. Ct. 1473 (1984).

Petitioners acknowledge that the situs of the policyholder's accident and the residence of the policyholder plaintiff are factors that may have bearing on the reasonableness of asserting jurisdiction, as distinguished from the forum state's power to exercise jurisdiction. As this Court has stated, "[o]nce it has been decided that a defendant has purposefully established minimum contacts with the forum State, these contacts may be considered in light of other factors to determine whether the assertion of personal jurisdiction would comport with 'fair play and substantial justice.'" Burger King Corp. v. Rudzewicz, 471 U.S. 462, 475-76, 105 S. Ct. 2174, 2184 (1985), quoting International Shoe Co. v. Washington, 326 U.S. 310, 320, 66 S. Ct. 154, 160 (1945) (emphasis added). The determination of the reasonableness of the state court's power to exercise in personam jurisdiction depends upon the evaluation of such factors as the burden on the defendant, the interests of the forum state in adjudicating the dispute, the plaintiff's interest in obtaining convenient and effective relief, the interstate judicial system's interest in obtaining the most efficient resolution of controversies, and the shared interest of the several states in furthering fundamental substantive policies. Asahi Metal Ind. v. Superior Court of California, 480 U.S. 102, 113, 107 S. Ct. 1026, 1033 (1987), quoting World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 292, 100 S. Ct. 559, 564 (1990).[4]

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[4] The foregoing reasonableness considerations "sometimes serve to establish the reasonableness of jurisdiction upon a lesser showing of minimum contacts than would otherwise be required." Burger King, 471 U.S. at 477, 105 S. Ct. at 2184, citing McGee v. International Life

(continued...)

In the case at bar, the reasonableness of asserting jurisdiction is not at issue. The trial court held that there were compelling reasons for New Jersey to assert jurisdiction. (App. at 16A-17A, 22A-23A.) The New Jersey Supreme Court did not upset that finding; it simply held that the trial court lacked power to exercise jurisdiction, no matter how reasonable it would have been to do so. Moreover, Respondents have not argued, and could not credibly argue, that the assertion of in personam jurisdiction over them would be unreasonable. Requiring Respondents to appear in the courts of New Jersey could not conceivably impair in any way their ability to defend claims against them. Indeed, any such claim of inconvenience by these multi-million dollar commercial enterprises -- many of which are constituents of some of the largest families of insurance entities in the world -- would be ludicrous. That is why the New Jersey Supreme Court found Respondents' similar arguments -- recast as forum non conveniens objections -- to be "flimsy at best." (App. at 69A.)

II. Respondents' Reliance On The Court's Decisions In Burger King And World-Wide Volkswagen Is Misplaced And Provides No Basis For Denying Petitioners' Writ.

Citing out of context the Court's reasoning in Burger King, Respondents contend that a contract, standing alone, is

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*(...continued)

Insur. Co., 355 U.S. 220, 78 S. Ct. 199 (1957) (the insurance contract at issue was held to have a "substantial connection" with the forum state even though the defendant insurer's contact with the forum state was limited to delivering the insurance policy in the forum state to the insured). In complex, multi-party insurance coverage cases, such considerations overwhelmingly favor exercising personal jurisdiction over alien insurers. (Trial Court Opinion, Petitioners' Writ at Appendix ("App.") at 16A-17A; Petitioners' Writ at 6-8, 21-22.)

insufficient to confer personal jurisdiction. (Auto Owners' Opposition at 6-7; Canadian Respondents' Opposition at 5.) On the contrary, this Court has long recognized that a contract may constitute sufficient minimum contacts to empower a court to exercise in personam jurisdiction. McGee v. International Life Ins. Co., 355 U.S. 220, 78 S. Ct. 199 (1957). Moreover, Respondents ignore that the appropriateness of exercising jurisdiction over a non-resident to enforce contracts to supply services within the forum is recognized in many state long arm statutes. See Uniform Interstate and International Procedures Act, § 1.03(a)(2) (1962); see also Szlay v. Handcock, 307 Ark. 232, 819 S.W. 2d 684 (1991) (territory of coverage clause constituted a promise to perform services within the forum state and, thus, the exercise of jurisdiction under the state long arm statute was proper). Suits on insurance policies are not entitled to less favored treatment under the Due Process Clause than suits under ordinary service contracts.

Further, Canadian Respondents, citing World-Wide Volkswagen, argue:

> A nationwide chain of service centers is closely analogous to the "nationwide promise of insurance services" posited by Petitioners as a contact created by a territory of coverage clause. In World-Wide Volkswagen, this Court rejected a contact of this nature as too attenuated to support a finding of jurisdiction, a holding which should govern here.

(Canadian Respondents' Opposition at 6.) The Court should not be swayed by such a superficial interpretation of World-Wide Volkswagen. Indeed, Respondents' argument has been explicitly addressed and rejected by the lower courts:

> Unlike the automobile sellers in World-Wide Volkswagen, automobile liability insurers contract to indemnify and defend the insured for claims that will foreseeably result in litigation in foreign states. Thus, litigation requiring the presence of the insurer is not only foreseeable, but it was purposefully contracted for by the insurer. Moreover, unlike a product seller or distributor, an insurer has the contractual ability to control the territory into which its "product" -- the indemnification and defense of claims -- will travel.

Farmers Insur. Exch. v. Portage La Prairie Mut. Insur. Co., 907 F.2d at 914; see also Rossman v. Consolidated Insur. Co., 832 F.2d 282, 286 (4th Cir. 1987) (the insurer's expectation of being haled into court in a foreign state, an express feature of its policy, is different than the ability of a distributor to foresee claims in a foreign state).

The Court has never addressed the constitutionality of the territory of coverage rule. While Respondents gloss over the conflict in the lower courts, "[u]ntil the Supreme Court affirmatively endorses or rejects the territory-of-coverage rule in an international case, the question of whether such clauses alone establish 'minimum contacts' will, no doubt, continue to rise." W. Hoffman, The Territory-of-Coverage Rule, supra at 716. Accordingly, the Court should grant certiorari to resolve this conflict, particularly in view of the increasing volume of comprehensive insurance coverage litigation throughout the country.

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